87-1234

NO. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections,
Petitioner,

v.

WILLIAM DUANE ELLEDGE, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER ELEVENTH CIRCUIT INCORRECTLY BALANCED STATE'S INTEREST IN APPROPRIATE COURTROOM SECURITY ARRANGEMENTS, TO PROVIDE FOR SAFETY OF COURTROOM PERSONNEL IN FACE OF RESPONDENT'S THREATS, AGAINST RESPONDENT'S SIXTH AMENDMENT RIGHTS, BY CONCLUDING THAT SHACKLING OF ALREADY-CONVICTED MURDERER, AT STATE CAPITAL SENTENCING PHASE, IS INHERENTLY PREJUDICIAL TO SAME EXTENT AS AT TRIAL, PRIOR TO CONVICTION.

II.

WHETHER ELEVENTH CIRCUIT INCORRECTLY INTERPRETED RESPONDENT'S RIGHTS TO FAIR TRIAL, AND DUE PROCESS, BY SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF STATE TRIAL COURT, ON IMPOSITION OF SHACKLING ON ALREADY-CONVICTED FELON AT SENTENCING, AND IMPOSING REQUIREMENT THAT STATE TRIAL COURT CONDUCT SUA SPONTE INQUIRY, BEFORE ORDERING SUCH SHACKLING.

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Petitioner RICHARD L. DUGGER, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeal, for the Eleventh Circuit, entered on July 20, 1987. A modified opinion was entered, on petitions for rehearing filed by the parties, on November 10, 1987.

CITATIONS TO OPINIONS BELOW

The original opinion of the Court of Appeals, for the Eleventh Circuit, is officially reported at 823 F.2d 1439 (11th Cir. 1987), and is set out in the Appendix hereto (to be referred to by "A" , followed by page number). at A, 1-84, infra.

The modified opinion of the Court of Appeals, officially reported at 833 F. 250 (11th Cir. 1987), and is reproduced in the Appendix, at A, 85-90 infra.

The decision of the United States District, Southern District of Florida, issued on September 5, 1985, is not yet officially reported, and is set out at A; 91-146 infra.

The decision of the Supreme Court of Florida, relevant to the issues raised herein, is reported at 408 S.2d 1021 (Fla. 1981), cert. denied, 459 U.S. 981 (1982), and is reprinted at A, 147-158 infra.

JURISDICTION

The judgment and decision of the Court of Appeals was filed on July 20, 1987, and Petitioner's timely petition for rehearing and suggestion for rehearing en banc were denied on November 10, 1987. This Court's jurisdiction is invoked, pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

Amendment VI of the Constitution, provides, inter alia, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

Amendment XIV, states, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

William Duane Elledge was convicted of the first-degree murder and rape of Margaret Anne Strack in March, 1975, in Hollywood, Florida, and sentenced to death on the murder charge. This sentence was imposed concurrently with a fifty year sentence for rape, and consecutively to a life sentence imposed upon Elledge in Jacksonville, Florida, for the commission of the murder of Kenneth Nelson. Following

his arrest for the Nelson murder, Elledge confessed to killing Ms. Strack, Mr. Nelson and Edward Gaffney, all within approximately thirty-six hours. Elledge v. State, 346 S.2d 998, 999-1000 (Fla. 1977).[1] The Florida Supreme Court affirmed the conviction, but reversed Elledge's death sentence, because of the State's use of an unconvicted offense (at that time, Elledge had not yet been convicted of the Gaffney murder) as an impermissible non-statutory aggravating cirumstance. Elledge, 346 S.2d, at 1002.

In September, 1977, Respondent was again sentenced to death for the Strack homicide, following a jury advisory recommendation of death (Sentencing

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[1] Other particularized facts about the crime, are detailed in Elledge v. State, 346 S.2d, supra. at 999-1000.

Transcript, at 394-400).[2] At the outset of Elledge's re-sentencing proceedings, and outside the presence of the jury, the trial judge made the following statements, outlining his reasons for placing Elledge in leg irons, during the sentencing proceedings:

> THE COURT: We will be in recess, gentlemen, for twenty minutes. I want to put something else on the record, too, before the jury gets in here.
>
> I received information from Chief Miro yesterday, the Chief of Detention for the Broward Sheriff's Office.
>
> He told me he received information from two of the Lieutenants -- one in the jail, and one in the Detective Division -- that

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[2] Further references to the August, 1977 transcript of Elledge's re-sentencing proceedings, will be by the symbol "ST", followed by a page number.

> Mr. Elledge had become a karate expert, while in prison -- apparently; and he was going to attack my Bailiff, either on the way to the courtroom or in the courtroom today, because he had nothing to lose -- he is now serving two life sentences, plus fifty years for rape; and he is facing a death penalty, or another life sentence, arising out of this situation; that he has been adjudged guilty of these particular crimes.
>
> In an abundance of precaution, I entered an Order to leave Mr. Elledge in leg irons here in these proceedings.

(ST, 10-11). Elledge's counsel, who had vigorously sought a continuance of the sentencing proceeding, just before this ruling, ST, 3-10, made a general objection to the shackling. (ST, 11). Elledge himself asked if he could "say something", and the trial court declined, thereafter recessing the proceedings for a short period. (ST, 11). Voir dire was

thereafter conducted, with a sentencing jury finally empanelled,[3] (ST, 11-198), and the sentencing proceedings conducted. (ST, 198-401). Subsequent to the trial court's ruling, placing physical restraints on Elledge, neither Elledge or defense counsel otherwise objected to the restraints. Furthermore, Elledge did not request that the jury be polled, individually or collectively, as to the possible effect of Elledge's shackling on their responsibilities as jurors, or on their advisory sentence recommendation; did not ask for any form of instruction, either curative or cautionary on the issue; did not suggest any other possible alternatives to shackling; and did not seek, by offer or proffer

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[3]This separate empanelling of a sentencing jury was made necessary, because Elledge had plead guilty to the Strack murder charge, in 1975.

of evidence, or request for a hearing, to challenge, contest or otherwise respond to the factual basis for the trial court's shackling order. To this day, there has been no such specific challenge, in any of Elledge's state or Federal proceedings.

During opening argument at sentencing, the State conveyed to the jury, that Elledge had pled guilty to the Strack murder. (ST, 200). Defense counsel himself, revealed, inter alia, that Elledge had confessed to, and admitted his guilt of the murders he committed. (ST, 204). Elledge's guilty plea, to the Nelson homicide, in October 1974, was admitted into evidence by the Court, as stipulated to by State and defense. (ST, 302). The State's evidence included, inter alia, Elledge's transcribed confession to the Strack murder, to police, which was played for the jury (ST; 233); and the testimony

of murder victim Kenneth Nelson's wife and son, (ST, 273-301), that included Elledge's threats to kill, while robbing the Nelsons, stating "I have already killed two people this week; and if you don't believe me, read the Hollywood papers . . . one more don't matter" (ST, 278, 282; 296). Additionally, in Elledge's own testimony, he confessed to all three killings, and the additional rape of Margaret Strack and robbery of Nelson. (ST, 328, 337-334, 335, 337, 343, 348, 353, 358-360). Defense counsel relied on such numerous confessions by Elledge, both in-court and out-of-court, as possible mitigation to be considered by the jury, in recommending a sentence. (ST, 385).

Elledge initially challenged his shackling at sentencing on direct appeal from his 1977 sentence of death. Elledge v. State, 408 S.2d 1021, 1022 (Fla. 1981).

The Florida Supreme Court specifically distinguished Elledge's position and status as "a confessed murderer of three persons", from cases involving the impact of shackling restraints on a defendant's presumption of innocence. Elledge, 408 S.2d, at 1022. The Court found no prejudice, and that the court was justified in relying on information that Elledge threatened to hurt the bailiff, concluding that Elledge "was an avowed dangerous individual . . . [and] through his confessed acts had proven himself a man of his word when violence was threatened . . . ." . Elledge, 408 S.2d, at 1023. This Court denied certiorari, when Respondent sought review of this opinion. Elledge v. Florida, 459 U.S. 981 (1982).

On review of this claim, in Elledge's Federal habeas corpus petition, the District Court concluded that Petitioner's

shackling "was not an abuse of discretion" by the state trial judge, in light of his "fear" for the safety of those participating in the trial. Elledge v. Wainwright, Case No. 83-6176-CIV-EBD, September 5, 1985, slip op, at 12. (A, 116. The District Court referred to the Florida Supreme Court's resolution of this issue. Id. (A; 116).

The Eleventh Circuit panel majority, concluded that the shackling of Elledge, was inherently prejudicial to his rights to a fair sentencing proceeding. Elledge, 823 F.2d, at 1450. (A; 49-52). Although conceding that there was "no definite answer" to the prejudicial impact of shackling, if any, on an already-convicted, confessed murderer at a capital sentencing hearing, the majority equated cases involving restraints at trials, with those involving restraints of a defendant at sentencing.

Elledge, at 1450-1451. (A; 51-52). Despite Elledge's failure to challenge the stated factual basis for shackling, or request a hearing, curative instruction, polling or less restrictive alternatives, the majority determined that he was prejudiced by the absence of an opportunity to challenge the court's stated basis for shackling. Elledge, at 1452-1453. (A; 55-59). Circuit Judge Edmondson, in his dissenting opinion, distinguished the circumstances and effect, of shackling at trial, from shackling at a capital sentencing, and concluded that the basis for this distinction, was that Respondent's entitlement to a presumption of innocence, no longer existed at his sentencing. Elledge, 823 F.2d, at 1453, 1454. (Edmondson, C.J., concurring in part, dissenting in part; (A; 65, 68-70). In his opinion, Circuit Judge Edmondson criticized the majority, for an unwarranted creation

of a Constitutional right, for convicted felons, to a pre-shackling hearing. Judge Edmondson further stated that the majority opinion was unsupported by analagous Federal decisions, and was an unjustified lack of deferrence to the State trial court's conclusions and reasoning. Elledge, 823 F.2d, at 1456-1457. (Edmondson, C.J, concurring in part, dissenting in part). (A, 67-72). Furthermore, Judge Edmondson recognized that a convicted murderer created additional threats to courtroom security, and that jurors ". . . would not be surprised at -- and probably would endorse -- the practice of physically restraining felons convicted of violent crimes when the felons are removed from the controlled environment of their penal institutions." Elledge, 823 F.2d, at 1455. The dissent thus concluded that Elledge was not

inherently or actually prejudiced by being shackled. Elledge, 823 F.2d, at 1452-1456. (A; 61-80).

In dissenting from the denial of rehearing and/or rehearing en banc, as sought by Petitioner, four members of the Eleventh Circuit concluded that Judge Edmondson's dissenting opinion represented the correct analysis and result, on the issue of Elledge's shackling at sentencing. (A; 86-90). The four members, joining in a dissent written by Circuit Judge Fay, criticized the panel majority, for placing physical restraints at sentencing, on a convicted felon who pled guilty, "in the same posture" as a defendant at the guilt/innocence phase. (A; 87). Judges Fay, Tjoflat, Hill and Edmondson further attacked the panel majority's analysis, in "faulting" the trial court's failure to further examine

the issue, when the trial court was not asked to do so, in any respect, by Elledge's counsel. (A; 87-88). The dissenting panel further noted the panel majority's failure to accord deferrence, on collateral review of a State judgment and sentence by a Federal court, to the State Court's findings and proceedings, in accordance with this Court's precedent. (A; 89.)

REASONS FOR GRANTING THE WRIT

I.

ELEVENTH CIRCUIT INCORRECTLY BALANCED STATE'S INTEREST IN APPROPRIATE COURTROOM SECURITY ARRANGEMENTS TO PROVIDE FOR SAFETY OF COURTROOM PERSONNEL, IN FACE OF RESPONDENT'S THREATS, AGAINST RESPONDENT'S SIXTH AMENDMENT RIGHTS, BY CONCLUDING THAT SHACKLING OF ALREADY-CONVICTED MURDERER, AT STATE CAPITAL SENTENCING PHASE, IS INHERENTLY PREJUDICIAL TO SAME EXTENT AS AT TRIAL, PRIOR TO CONVICTION.

This Court, in its prior opinions, dealing with the impact of various forms of physical restraints placed on an unconvicted defendant at a criminal trial, has consistently relied on the existence or lack of prejudice to the defendant's presumption of innocence, as embodied in the Sixth Amendment right to a fair trial. Holbrook v. Flynn, 475 U.S. _____, 106 S.Ct. _____, 89 L.Ed.2d 525, 533-536

(1986); Estelle v. Williams, 425 U.S. 501 (1976); United States ex rel Illnois v. Allen, 397 U.S. 337 (1970). A defendant's entitlement to physical indicia of the presumption of innocence, and consideration by the jury of the question of guilt or innocence, based solely on evidence, have been the linchpin of the analysis of this, and other Federal courts, reviewing various forms of physical restraints. Holbrook Supra; Estelle, Supra; United States v. Hack, 782 F.2d 862 (10th Cir. 1986); (shackles); United States v. Fountain 768 F.2d 790 (7th Cir. 1985); (same); Brofford v. Marshall, 751 F.2d 845 (6th Cir. 1985); (same); Allen v. Montgomery, 728 F.2d 1409 (11th Cir. 1984); (handcuffs, increase in guards); Zygadlo v. Wainwright, 720 F.2d 1221 (11th Cir. 1983); (shackles); Harrell v. Israel, 672 F.2d 632 (7th Cir. 1982); (shackles); United States v. Theriault, 531

F.2d 281 (5th Cir. 1976) (shackles). In determining the prejudicial impact of enhanced security measures taken at a trial, this Court, and other Federal courts, have balanced the State's interest, in appropriately providing for particular courtroom security measures, for legitimate safety reasons, against a defendant's right to be tried, without restraints. Holbrook, 89 L.Ed.2d, at 533-536; Allen, 397 U.S., Supra, at 343-344; Hack, 782 F.2d, Supra, at 867; Wilson v. McCarthy, 770 F.2d 1482, 1484 (9th Cir. 1985); Zygadlo, 720 F.2d, Supra, at 1223.

Both the Eleventh Circuit majority and dissenting opinions, in this case, specifically observed that no Federal court, including this Court, had ever examined or addressed the impact of physical restraints, on an already-convicted defendant, imposed at a capital sentencing

phase. Elledge v. Dugger, 823 F.2d 1439, 1450 (11th Cir. 1987); Elledge, 823 F.2d, supra, 1453-1454; 1455 n. 6 (Edmondson, C.J. concurring in part and dissenting in part). Both opinions openly acknowledged that this was one of "first impression" for Federal courts, Elledge, 823 F.2d, Supra, at 1453, 1454 (Edmondson, C.J. concurring in part, dissenting in part), with "no definitive answer." Elledge, at 1450; Elledge, at 1455, n. 6 (Edmondson, C.J. concurring in part, dissenting in part). Because the presumption of innocence is non-existent at a criminal defendant's sentencing, upon plea and conviction of the most heinous crime that can be committed against society, and was not correctly distinguished at all by the Eleventh Circuit panel majority, from trial circumstances, this Court must accept jurisdiction, to resolve this issue.

The Eleventh Circuit majority, and dissent, clearly acknowledged a distinction between prior State and Federal decisions, involving the effect of restraints on a defendant, during a determination of guilt or innocence, and the factual scenario of a post-conviction capital sentencing proceeding. Elledge, at 1450; Elledge, at 1452-1455 (Edmondson, C.J, concurring in part, dissenting in part). Nevertheless, the majority completely equated these vastly different circumstances. Elledge, at 1451. This approach completely ignores the effect of the absence of any presumption of innocence that an already-convicted murderer possesses, which is clearly a defendant's paramount interest in being free of physical restraints. Holbrook; Allen; Hack; Zygadlo. The clear absence of any inherent prejudice to a convicted felon, under these circumstances,

has been correctly analyzed, to result in affirmance of State criminal convictions, by approximately one-third of the entire Eleventh Circuit panel, and several state courts of last resort, (including the Florida Supreme Court, in this case), involving this Federal question. Elledge, at 1452-1457 (Edmondson, C.J, concurring in part and dissenting in part); Elledge v. Dugger, 833 F.2d 250, 250-252 (11th Cir. 1987) (denial of rehearing en banc) (Fay, C,J; Hill, C.J; Tjoflat, C.J; Edmondson, C.J, dissenting opinion); Marquez v. State, 725 S.W.2d 217, 227, 230 (Tex Cr App 1987), cert. denied, 108 S.Ct. 201 (1987); Bowers v. Maryland, 507 A.2d 1072, 1077-1081 (Md. 1986) cert. denied, 93 L.Ed.2d 395 (1986); Elledge v. State, 408 S.2d 1021, 1022 (Fla. 1981) cert. denied, 459 U.S. 981 (1982) (Elledge's status as a"confessed murderer of three persons", differentiates him from

those restrained at trials, regarding rights to fair trial, presumption of innocence).[4] Thus, the dispute over resolution of this crucial Federal question, completely novel to this Court's prior jurisprudence, and the existence of substantial State and Federal authority contrary to the Eleventh Circuit's panel majority, mandate acceptance of certiorari, to settle this controversy. Rules 17.1 (a), (c), Rules of the Supreme Court.

This Court has said that the determination of whether a particular security arrangement, is prejudicial to a

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[4]This Court's denial of certiorari relief, in all 3 of these state court decisions, where the issue of the shackling of already-convicted murderers at sentencing was raised, significantly left intact Florida, Maryland and Texas results, on the same Federal question, which stand in stark and direct contrast to the opinion under review here. Rule 17.1(a),(b),(c), Rules of the Supreme Court.

defendant's rights to a fair trial, depends on ". . . reason, principle, and common human experience". Holbrook, 89 L.Ed.2d, at 535; Estelle v. Williams, 425 U.S., Supra at 504. It is readily apparent that the panel majority in Elledge ignored or misinterpreted this analysis. Clearly, the State's interest, in protecting courtroom personnel and participants from a defendant, freshly convicted of first-degree murder, is greater than in a guilt-innocence phase context. Fountain, 768 F.2d, Supra, at 794; Harrell, 672 F.2d, Supra, at 637 (courtroom may be ideal setting for convicted felon to act upon threats of violence). Combined with the aforementioned non-existent interest of the defendant, at sentencing, in his presumed innocence, this Court's prior balancing of interests between the State and defendant does not encompass this brand new

equation. This conclusion further substantiates the position, that this Court has not, and must now address this Federal question, in this "unsettled" context. Rule 17.1 (c), Supra.

In the exercise of common sense, the jurors could not have been inherently prejudiced against Respondent, when they knew, from the outset of his sentencing proceeding, that he was a convicted murderer. An appropriate analogy exists, as Judge Edmondson observed in his dissent, with the Federal decisions involving prison inmates who were shackled or in prison clothes, while testifying or being tried at criminal trials. Wilson v. McCarthy, 770 F.2d at 1483, 1485 (no prejudice since jury knew from testimony that witness was inmate, member of prison gang, and that defendant on trial for prison assault, of fellow prisoner); Fountain, 768 F.2d, at

794 (no prejudice, since jury knew defendant and witnesses were prison inmates and guards, from criminal charges); Harrell, 672 F2d, at 638 (same); United States ex rel Stahl v. Henderson, 472 F.2d 556, 557 (5th Cir. 1973) (no prejudice, from defendant testifying in prison clothes, since jury knew defendant was on trial, for the murder of a fellow prison inmate;) Kennedy v. Cardwell, 487 F.2d 108, 111 (6th Cir. 1973)(no prejudice, since was "inevitable" that testimony at trial would reveal defendant's prior escapes from prison); see also, e.g., State v. Williams, 485 A.2d 570, 575 (Conn 1985) (jury knew, from charges of possession of weapon in prison, that defendant was prison inmate). These cases are particularly apt to Respondent's proceedings, where the jury was informed, by jury instructions, argument and testimony, (in part stipulated to and elicited

from Respondent himself), that Respondent had confessed and plead guilty to murdering three people, in different lcoations, in less than two days. The jury additionally heard of Elledge's threats of harm, while robbing the Nelson family, by his boasting of having "already killed two peole this week". (ST, 278, 296). The Florida Supreme Court characterized Elledge, based on the circumstances of his murders of Margaret Strack, Edward Gaffney, and Kenneth Nelson, as "an avowed dangerous individual . . . . [who] through his confessed acts had proven himself a man of his word when violence was threatened . . ." Elledge v. State, 408 S.2d, Supra, at 1023. (emphasis added). As alluded to by Judge Edmondson, in his dissent, the shackling of such a person might actually have worked to Elledge's advantage, by showing the State's ability to completely

control his conduct, thus making the death penalty "unnecessary". Elledge, at 1455, n. 6 (Edmondson, C.J, concurring in part, dissenting in part). Respondent's clearly dangerous and violent nature, and his status as a convicted killer, conveyed to the jury by proper evidence and argument, regardless of any such arguable impact of his shackles, defeats any application of inherent prejudice to Respondent's circumstances. Elledge, at 1454-1456 (Edmondson, C.J., concurring and dissenting in part). The jury, under "common human experience", would reasonably have expected that Respondent, as a convicted murderer, would be "controlled" in some manner, for the protection of everyone in the courtroom. Id. Under these circumstances, there was no inherent or actual prejudice to Respondent. This perspective, again demonstrates the error by the Eleventh

Circuit, in failing to distinguish between trial and sentencing restraints in any way, and the need for this Court to resolve this issue.

The importance of this Federal question is further evidenced by the unquestionable conclusion that this issue has and will continue to arise more frequently, in both capital and non-capital sentencing contexts. This is especially foreseeable in capital cases, given the obvious and legitimate safety concerns presented by threats to courtroom personnel, similar to those made by Respondent. (ST, 10, 11); see, e.g., Marquez, 725 S.W.2d, Supra, at 228 (attacks by defendant of other inmates, threats of harm against prosecutor; threats to escape, prior possession of deadly weapon, in jail, formed stated basis for shackling at capital sentencing); Bowers, 507 A.2d, supra, at 1073-1075 (incidents of

asault on prison guard, while jailed, necessitating transfer to other prison, formed basis for shackling). These factual circumstances are clearly capable of repetition at other future State sentencing proceedings, and on Federal collateral review, requiring the immediate binding and uniform resolution of this issue, by this Court.

The Eleventh Circuit's majority decision, extending this Court's precedent to a clearly inapplicable and distinguishable set of facts, has effectively undermined the underlying principles of this Court, governing the use of physical restraints on a defendant. This Court's prior decisions, clearly did not directly address the propriety of shackling, as the sole restraint, at a defendant's capital sentencing. Holbrook; Estelle; Allen. The

Eleventh Circuit's treatment of convicted murderer-felons in this context, on an exactly equal footing with unconvicted individuals, presumed innocent while standing trial, undermines and "chills" the exercise of discretion by state trial judges, to provide for security and control of their sentencing proceedings. This Court should exercise jurisdiction, in order to address this issue as a matter of first impression, and to correct the Eleventh Circuit panel majority's erroneous reasoning and unwarranted extension of Sixth and Fourteenth Amendment rights to Respondent. The lack of any inherent or actual prejudice to Respondent, by virtue of being shackled at his sentencing, requires reversal of the opinion under review.

II.

ELEVENTH CIRCUIT INCORRECTLY INTERPRETED RESPONDENT'S RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS, SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF STATE TRIAL COURT, ON IMPOSITION OF SHACKLING ALREADY-CONVICTED FELON AT SENTENCING, AND IMPOSING REQUIREMENT THAT STATE TRIAL COURT CONDUCT SUA SPONTE INQUIRY BEFORE ORDERING SUCH SHACKLING.

In Holbrook v. Flynn, supra, this Court expressly limited the role of a Federal court, in reviewing a collateral challenge to a state court's imposing of restraints on a criminal defendant. Such decisions were not to be based on a Federal court panel's independent judgment of the "preferred" security arrangement. Holbrook, 89 L.Ed.2d, at 536-537. This Court stressed that a Federal court's sole function was to "determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to

defendant's right to a fair trial." Id. This standard of review reflects the fact that trial courts are best left with discretion, in determining the most appropriate security measures, since they are in the best position to evaluate the necessary extent of such measures, to prevent harm to others from a defendant. Hack, 782 F.2d, Supra at 867; United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1970). Because of these circumstances, and the uniquely factual foundations for a state trial court's determination on these matters, that are peculiarly within its province to decide, such a determination is entitled to extreme deferrence. Elledge, at 1456 (Edmondson, C.J, concurring in part, dissenting in part); Elledge, 833 F.2d supra, at 251 (on petition for rehearing and petition for rehearing en banc) (Fay, C.J; Tjoflat, C.J; Hill, C.J;

Edmondson, C.J, dissenting); Holbrook, supra; Witt v. Wainwright, 469 U.S. 412, 427-429 (1984); Patton v. Yount, 467 U.S. 1025, 1038 (1984). Thus, in the event that this Court decides that prior cae law can be applied to Elledge's circumstances, solely on the Eleventh Circuit's scope of review, and obligation to hold a sua sponte pre-shackling inquiry, this Court must correct the Eleventh Circuit's approach and result.

It is apparent that the Eleventh Circuit panel "second-guessed" the state trial court's exercise of such discretion, and criticized his failure to take certian action, even in the face of no request for such action by Respondent. Elledge, at 1451, 1452 (A; 55-59). The opinion consists of conclusions by the majority, that the state trial court "should have allowed" Respondent to speak with counsel,

so as to create the speculative possiblity that Respondent then ". . . could have possibly made a more specific argument against shackling". Elledge, at 1451-1452. The majority additionally faulted the state trial judge, for failing to consider other alternatives to shackling, conduct a jury poll, or give a cautionary instruction. Elledge at 1451-1452. However, the Eleventh Circuit majority did not discuss or rely upon the Record of what the state trial court did do, so as to conduct the limited scope of Federal review, mandated in Holbrook. The opinion does not engage in any such analysis, except to speculate about what might have occurred, had the trial judge taken the "better" course of action, sua sponte. Elledge, at 1451-1452.

This analysis is directly and apparently inconsistent with the proper scope of

review of such ruling, expressed in Holbrook and other Federal decisions, that a Federal court's independent view of the "better course of action" is an irrelevant and inappropriate criterion. Holbrook; Wilson v. McCarthy, Supra; Elledge, at 1456 (Edmondson, C J, concurring in part, dissenting in part); Elledge, 833 F.2d, at 150-151 (on petitions for rehearing and rehearing en banc) (Fay, C.J; Tjoflat, C.J; Hill, C.J; Edmondson, C.J, dissenting). The Eleventh Circuit panel majority's substitution of its own judgment, for that of the State trial court, demonstrates readily apparent conflict with this Court's precedent. Holbrook, Supra. The majority's failure to defer to the state trial court's factual findings, is further at odds with prior rulings of this Court, Witt, Supra; Patton, Supra; and other Federal courts which have deferred to the

state trial court's exercise of discretion. Allen, 397 U.S., at 345-346; Wilson v. McCarthy, 770 F.2d, Supra, at 1484; Woodard v. Perrin, 692 F.2d 220, 221 (1st Cir. 1982); Harrell, 672 F.2d, at 635-636; United States v. Theriault, 531 F.2d, at 284; Kennedy v. Cardwell, 487 F.2d 101, 107, 110 (6th Cir. 1973); cert. denied, 416 U.S. 959 (1974).

The Eleventh Circuit's exercise of authority, in excess of the proper scope of collateral review on such an issue, and in a manner directly and apparently inconsistent with this Court's precedent, requires the immediate resolution of this Court. Rule 17.1(c), Rules of the Supreme Court. Jurisdiction is further appropriate, to resolve the intercircuit conflict created by the Eleventh Circuit's action, Rule 17.1 (a), Supra, and to rectify the Eleventh Circuit's unwarranted

departure from governing rules of law established by this Court. Rule 17.1(a).

It is apparent from the Record, see Statement of the Case, Supra, that in the face of the imposition of shackling upon him at sentencing, Respondent did not challenge, attack or otherwise question the existence or impact of such restraints, beyond a very general objection.[5] (ST, 10,11). Respondent never challenged, by offer or proffer of evidence, statements or arguments, the stated factual basis, justifying Elledge's shackling at sentencing. (ST, 1-401). Counsel did not request a hearing on the matter, request

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[5] The Elledge majority and dissent did not view or characterize Respondent's request to "say something", declined by the state trial judge, (ST, 11), as a request for a hearing on the matter. Elledge, at 1451-1452 Elledge, at 1453, n. 1 (Edmondson, C.J, concurring and dissenting in part).

any form of jury polling, or request any type of jury instruction, that sought to explore or determine the impact or consequences of Repondent's shackling upon the jury. However, the Eleventh Circuit's panel majority effectively concluded that the state trial court had erred by not providing Respondent with a chance to challenge the basis for his shackling, not conducting any inquiry, into possible less restrictive alternatives to shackling; not polling the jury, to determine the extent of prejudice, if any by the fact of Respondent's shackles; and not providing a "cautionary" instruction. Elledge, at 1451-1452. This decision is in such direct and express conflict, with sister Courts of Appeal, on the same subject, that the case appropriately invokes certiorari jurisdiction by this Court, to resolve this conflict.

Several other Circuits, in analyzing the same matter, have concluded that a failure to challenge or otherwise request some form of inquiry, instructions, or polling on the impact and consequences of physically restricting a defendant, does not obligate the state trial judge to conduct such proceedings on his own. The Fifth Circuit has held that, in the absence of any objections, or requests for relief, or challenge of the stated basis for restraints, any possible violation of his Constitutional rights is waived, and that the trial judge need not conduct a hearing or take other action, besides justifying his imposition of restraints in the Record. United States v. Diecidue, 603 F.2d 535, 549-550 (5th Cir. 1974); Wright v. Texas, 533 F.2d 185,m 187 (5th Cir. 1976); United States v. Theriault, 531 F.2d, Supra, at 285. These panel decisions

have explicitly conditioned the need for a pre-restraint hearing, on the prerequisite that a criminal defendant affirmatively challenge the factual basis relied upon for such restraints. Id; see also United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1970). The Eleventh Circuit's decision, in nevertheless mandating that such a hearing be held, without any such affirmative action then, or since, by Respondent, clearly creates a division between these Circuits, on this important Federal question. Rule 17.1(a), Supra.

The Second Circuit Court of Appeals, in United States v. Taylor, 562 F.2d 1345 (2nd Cir. 1977), specifically ruled that in the absence of a request by the defendant for voir dire or polling of the jury, regarding the effect of the jurors' viewing of the defendant in manacles, no error could be attributed to the State trial court, for

not conducting such voir dire on its own. Taylor, 562 F.2d, supra, at 1359. The Second Circuit panel further noted that such a sua sponte voir dire procedure, may well have inappropriately made jurors more conscious of the defendant's custodial status. Taylor, at 1359-1360. The Eleventh Circuit's approach, clearly creates direct conflict with Taylor, as well.

More recently, in Wilson v. McCarthy, 770 F.2d 1482 (9th Cir. 1985), a panel of the Ninth Circuit, even though observing that a state trial court might have been "better served" by giving a cautionary instruction, as to the possible prejudicial impact of a shackled witness, declined to assign error to the trial court for not giving a sua sponte instruction. Wilson, 770 F.2d, Supra, at 1485; 1485, n. 3. The Court further concluded that, in the

absence of any defense request or showing that alternatives less restrictive than shackling, would serve legitimate security interests, there was no error by the State trial court, in failing to consider such alternatives. Wilson, at 1486.

This argument is substantiated by the fact that Elledge represents such a departure from governing legal precedent, within the Eleventh Circuit itself. Significantly, even in prior cases within the same Circuit, other panels have refused to attribute error to a state trial judge who does not hold a hearing or examine less restrictive alternatives to shackling, when none are requested by a defendant. Allen v. Montgomery, 728 F.2d 1409, 1413, n. 4 (11th Cir. 1986); Zygadlo v. Wainwright, 720 F.2d 1221, 1224 (11th Cir. 1983). Significantly, Circuit Judges Hill and Tjoflat, who were each part of the

unanimous panels in Allen, supra, and Zygadlo, supra, joined as dissenters from the denial of rehearing en banc in Elledge. Elledge, 833 F.2d,at 250.

Thus, the clear conflict on this crucial issue, between the Eleventh Circuit in Elledge, and those aforementioned opinions of the Second, Fourth, Fifth and Ninth Circuits, requires immediate resolution by this Court, in the proper exercise of its certiorari jurisdiction.

CONCLUSION

Petitioners have attempted to present several substantial reasons, upon which to conclude that the crucial Federal question of inherent and/or actual prejudice, from shackling an already-convicted defendant at a capital sentencing proceeding, has not and should be addressed by this Court. There are substantial bases for this Court's exercise of jurisdiction in this case, including several examples of conflict between the opinion under review, and past opinions of this Court, sister Federal Courts of Appeals, and state courts of last resort. Rule 17.1(a),(c). Based on the foregoing, Petitioners respectfully request that this Court GRANT the petition for writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-5120

WILLIAM DUANE ELLEDGE,

Petitioner-Appellant,

versus

RICHARD L. DUGGER,

Respondent-Appellee.

Appeal from the
United States District Court for the
Southern District of Florida

(July 20, 1987)

Before RONEY, HATCHETT and EDMONDSON, Circuit Judges.

PER CURIAM:

Defendant-petitioner William Duane Elledge appeals a district court order denying him federal habeas corpus re-

lief; he raises six bases for relief. Because we find that Elledge has shown that his constitutional rights were violated in one respect, we vacate the district court's judgment and remand with instructions.

Elledge was involved in three killings that occurred in a 36 hour period in August, 1974,[2] although only the first murder -- of Margaret Anne Strack -- is at issue on appeal. Strack was raped and killed in Hollywood, Florida, on August 24, 1974; the two subsequent murders occurred in Jacksonville, Florida. Early in the morning of August 26, Jacksonville police arrested Elledge for the third homicide. He then was interrogated four times between 4:30 a.m.

[2] The facts and details of this crime spree are set forth in Elledge v. State, 346 So.2d 998 (Fla. 1977).

and 10:30 a.m. that morning; the police properly informed Elledge of his rights on each occasion. See generally Miranda v. Arizona, 384 U.S. 436, 86 S. Ct 1602, 16 L.Ed.2d 694 (1966). During the course of their questioning and investigation, the Jacksonville police determined that Elledge was a suspect in the Strack homicide and questioned him about it as well. At the last interrogation, Elledge orally confessed to all three murders. The next day he again confessed to the Strack murder after follow-up interrogation by Hollywood police investigators; this confession was tape recorded.

Elledge's public defender adopted the following strategy: (1) plead insanity if possible; (2) if that defense was not available, suppress the

confession and plead not guilty; and (3) if the confession could not be suppressed, plead guilty and seek mercy. The insanity defense proved fruitless when psychiatrists found Elledge to be sane; efforts to suppress the confessions on the grounds that Elledge was physically coerced because he confessed without sleep or food and was still under the influence of drugs and alcohol also failed. Under advice of counsel, Elledge then entered a plea of guilty, leaving sentencing as the sole issue to be determined.

Although a sentence of death was entered after the first sentencing hearing (in 1975), the Florida Supreme Court overturned that sentence and remanded the case for a new sentencing hearing. Elledge v. State, 346 So.2d 998 (Fla.

1977). The same state trial judge presided over the second sentencing hearing; he appointed the same attorney, who by this time was in private practice, to represent Elledge. This second sentencing hearing, held in 1977, is the sentencing hearing referred to in the balance of this opinion.

Elledge's taped confession was played at the sentencing hearing; additionally, a variety of witnesses testified. Defendant took the stand in his own behalf and detailed his harsh childhood and early addiction to and abuse of alcohol and drugs. A jury considered the evidence and recommended death; the judge agreed and, thus, entered a sentence of death. A series of unsuccessful state appeals followed.[3] After ex-

[3] The Florida Supreme Court affirmed

hausting all state remedies, Elledge filed a petition for a writ of habeas corpus with the United States District Court for the Southern District of Florida. That court held an evidentiary hearing and concluded that, while counsel's performance at the sentencing hearing was inadequate, no prejudice resulted from counsel's unreasonable performance. The district court then denied the petition, and this appeal followed.

Elledge makes these contentions on appeal: (a) counsel's performance in challenging the confession was inadequate and prejudiced Elledge; (b) the

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Elledge's death sentence. Elledge v. State, 408 So.2d 1021 (Fla. 1981), cert. denied, 459 U.S. 981 (1982). Elledge then sought and was denied collateral relief pursuant to Fla.R.Crim.P. Sec. 850. The Florida Supreme Court affirmed. Elledge v. Graham, 432 So.2d 35 (Fla.), cert. denied, 464 U.S. 986 (1983).

district court's conclusion that no prejudice arose from counsel's inadequate representation at the sentencing phase was erroneous because the court failed to consider that the evidence not adduced would have altered the entire evidentiary picture: (c) Elledge did not receive an individualized capital sentencing determination because the trial judge refused to consider any nonstatutory factors that mitigated against imposing the death penalty; (d) the death penalty was applied mechanistically under Florida's felony murder rule without regard for whether Elledge intended that a life would be taken; (e) the death penalty is applied in an arbitrary and discriminatory manner in Florida as evidenced by empirical studies that indicate a disproportionality in

death sentences based on the race and/or sex of the victim; and (f) the district court's decision to shackle Elledge at the sentencing hearing was inherently prejudicial.

1. Effectiveness of Representation in Seeking to Suppress the Confessions.

As a threshold matter, effective assistance of counsel is a two-prong issue. The petitioner must establish both that counsel's performance was not reasonably adequate and that petitioner was prejudiced by that unreasonable performance to the point that he did not receive a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct 2052, 2064, 80 L.Ed.2d 674, 693 (1984). Elledge's basic claim is that his counsel was ineffective because he failed to

use the proper theory in challenging the confessions. The two confessions require different analytic frameworks; therefore, we will discuss each separately.

A. The first, untaped confession

Elledge's counsel sought to suppress the first confession, arguing that it was involuntary because it was physically coerced. Counsel maintained that Elledge had no sleep the night of his arrest and interrogation, had no food and drink during his interrogation, confessed while hung over and under the residual impact of drugs and alcohol, and was in a general "daze" at the time of his confession.[4] Counsel did not argue,

[4] Elledge maintains that this daze was the result of three people dying in such

however, that Elledge's fifth amendment rights were violated when the police repeatedly reinterrogated and rewarned him of his Miranda rights despite Elledge's alleged invocation of his right to silence. This omission was unreasonable representation according to Elledge. We disagree.

The test for the performance prong of Strickland is objective "reasonableness under prevailing professional norms." Id. at 688, 104 S.Ct at 2065, 80 L.Ed.2d at 694. A reviewing court conducting such an examination must view the performance at the time it occurred, avoid the "distorting effects of hindsight," id., and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable pro-

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a short period of time.

fessional assistance ..." Id. at 689, 104 S.Ct at 2066, 80 L.Ed.2d at 694.

Until Michigan v. Mosley, 423 U.S. 96, 102-04, 96 S.Ct 321, 326, 46 L.Ed.2d 313, 320-22 (Dec. 9, 1975), repeated re-interrogation in conjunction with repeated Miranda warnings was not recognized as a potentially coercive technique. Elledge's counsel sought to suppress the first confession in March, 1975; obviously, he did not have the benefit of Mosley at that time. Furthermore, as of March, 1975, no Florida courts had held that such procedures were coercive. Reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop. See Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir.), af-

firmed, 104 S.Ct 450, 78 L.Ed.2d 266 (1983) (per curiam). Thus, Elledge's claim fails on the first, performance prong of Strickland.

B. The second, taped confession

Even if we assume, arguendo, that counsel's performance was unreasonable because he did not attack the police's alleged failure to honor Elledge's invocation of his right to remain silent,[5] we find that no prejudice attached as a result, because the second confession was admissible -- under either of two alternative grounds -- even if the first confession was not.

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[5] Elledge now contends that the police repeatedly reinterrogated him -- albeit after warning him of his Miranda rights on each occasion -- after only short periods of time had passed.

A confession that follows on the heels of an involuntary confession may be tainted thereby and thus inadmissible. Martin v. Wainwright, 770 F.2d 918, 928 (11th Cir. 1985), modified on other grounds, 781 F.2d 185 (11th Cir. 1986). The taint transfers, however, only if the first confession was inadmissible as involuntary, i.e., coerced and not the product of a free will. See Oregon v. Elstad, 105 S.Ct 1285, 1294, 84 L.Ed.2d 222, 231 (1985); Martin, 770 F.2d at 928. This circuit has held that not honoring a request to stop questioning is no different from failing to give the Miranda warning in the first place; while both are "technical" violations of Miranda, neither violates the fifth amendment. Martin, 770 F.2d at 928-29 (relying on Elstad, 105 S.Ct at 1293,

84 L.Ed.2d at 231). Thus, confessions obtained by such violations, while inadmissible because they run afoul of Miranda's per se bar, are not "involuntary"[6] and do not taint any subsequent confessions. Id. Therefore, the second, taped confession was not made inadmissible even if the first confession resulted from technical Miranda violations.

Furthermore, even if the first confession was both violative of Miranda and involuntary, Elledge cannot prove he was prejudiced by admission of the second confession because it was sufficiently distinct from the first confes-

6 Whether a statement is "voluntary" requires application of pre-Miranda due process voluntariness analysis. Martin, 770 F.2d at 928. That is, the court must look at all the circumstances to determine whether the confession was made of the accused's free will. Id. at 925.

sion and, therefore, admissible. See Elstad, 105 S.Ct at 1294, 84 L.Ed.2d at 232-33 (dicta). When an earlier confession has been coerced and, thus, was involuntary, a court seeking to determine whether a subsequent confession is tainted thereby must look to "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators." Id.; see Holleman v. Duckworth, 700 F.2d 391, 396 (7th Cir. 1983); United States v. Gresham, 585 F.2d 103, 108 (5th Cir. 1978).[7]

In Elledge's case, a full day had passed between the confessions; he had slept and eaten; new interrogators

[7] In Bonner v. City of Prichard, 661 F. 2d 1206 (11th Cir. 1981) (en banc), this court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

were employed (although his orginal interrogator was present for part of the new questioning); and the interrogation occurred in entirely different and comfortable surroundings. Additionally, his inquisitors did not use the first confession as leverage to coerce the second. See Graham, 585 F.2d at 108.

Consequently, if counsel had succeeded in suppressing the first confession by means of a Mosley-type attack, the second confession nevertheless would have been admissible. Therefore, even were we to assume that counsel's failure to adopt such a strategy rendered his performance unreasonable, Elledge cannot demonstrate that any prejudice inhered as a result. Counsel's performance thus was not ineffective under Strickland.

II. Effectiveness of Representation at the Sentencing Hearing[8]

The district court held an evidentiary hearing and concluded that Elledge's counsel rendered unreasonable assistance at the sentencing phase because he failed to investigate and to present a psychiatric mitigating defense based on his client's mental deficiencies, abject childhood and history of drug and alcohol abuse. That court nevertheless determined that counsel was not ineffective because the failure did not prejudice Elledge: he would have received the same sentence even had such evidence been adduced. See Strickland, 466 U.S. at 695, 104 S.Ct at 2069, 80 L. Ed.2d at 698. Because these conclusions

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[8] The district court considered this to be Elledge's sole claim with "arguable" merit.

are subject to plenary review by this court,[9] id. at 698, 104 S.Ct at 2070, 80 L.Ed.2d at 700, we shall discuss each separately.

A. Performance

As discussed earlier, the first prong in an ineffective assistance claim is whether counsel's performance was professionally unreasonable. A reviewing court, however, must be highly deferential in scrutinizing counsel's performance; the tendency and temptation to second-guess is high and must be avoided. Strickland, 466 U.S. at 689, 104 S.Ct at 2065, 80 L.Ed.2d at 694.

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[9] The underlying factual findings of the district court are presumptively correct unless clearly erroneous, and the factual findings of the state court are subject to the 28 U.S.C. Sec. 2254 (d) presumption of correctness. Id.

Thus, we look to the particular facts of the case and determine whether the acts or omissions were "outside the wide range of professionally competent assistance" to the extent that the errors caused the "adversarial testing process" not to work. Id. at 690, 104 S.Ct at 2066, 80 L.Ed.2d at 695.

In this case, the claim is that counsel failed to investigate Elledge's past.[10] Specifically, the district

[10] Strickland requires only that counsel conduct a reasonable investigation or make a reasonable decision not to investigate. Strickland, 466 U.S. at 691, 104 S.Ct at 1066. Establishing what a reasonable investigation would have entailed often will be pivotal. Testimony from lawyers normally will be necessary to establish what the reasonable level and quality of investigation would be. In some extreme cases, such as where no investigation occurred, a judge can conclude, even in the absence of expert testimony, that the investigation -- or lack thereof -- was deficient. We devote little attention to this first step, in this case, because the court correctly concluded that, under these

court found that counsel made no effort either to locate an expert psychiatric witness or to put on background character testimony from family members in mitigation.[11] This factual determina-

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circumstances, some investigation was required.

[11] Elledge's counsel's performance was not inadequate, according to the state, since counsel was aware that an unbroken trail of psychiatric evaluation unanimously had not found Elledge to suffer from an organic brain dysfunction. Given this diagnostic history, the State claims it was a reasonable decision to conduct no investigation. Were these the sole facts presented we might agree; but other relevant facts require a different conclusion.

Elledge's counsel was convinced in 1975 that Elledge was "crazy"; he continued to hold that conviction in 1977 (i.e., prior to the second sentencing hearing) despite two court-ordered psychiatric evaluations to the contrary. Counsel then discovered, in talking with Elledge, that prison authorities had been treating Elledge with Mellaril and Dilantin while he was incarcerated pending the 1977 sentencing hearing. Mellaril is an antipsychotic medication and Dilantin is an antiepileptic medication. Despite this new information,

tion is not clearly erroneous.[12] See

which supported his already held conviction that his client was "crazy," counsel did not seek new expert advice. Counsel's failure to pursue the issue, once its viability was renewed, was inadequate professional performance.

[12] When a defendant informs counsel that "certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Strickland, 466 U.S. v. 691, 104 S.Ct at 1066. The record is not completely clear whether Elledge's counsel ever asked his client about possible testimony by family members. All indications, however, are that no such questioning occurred. Elledge did eventually imply that he did not feel his family would be particularly interested. Although the record is somewhat opaque, we feel the district court was not clearly wrong in deciding that counsel was aware that family members existed who could corroborate, and perhaps expand on, Elledge's testimony. The court also was not clearly erroneous in concluding that Elledge had not dissuaded counsel from undertaking an investigation to determine the willingness of such family members to testify. We note that Elledge's brother and sister stated that had they been approached in 1977 they would have testified.

id. at 698, 104 S.Ct at 2070, 80 L.Ed.2d at 700. As the court noted, "counsel presented a psychiatric defense without a psychiatrist," relying instead solely on Elledge's "free-form" testimony about his background and mental impairments.

We accept the district court's view that counsel's failure at least to interrogate Elledge's relatives and to seek an expert witness was outside the range of competent assistance. See Tyler v. Kemp, 755 F.2d 741, 744-45 (11th Cir. 1985), cert. denied sub nom. James v. Tyler, 106 S.Ct 582 (1985), overruled in part (on other grounds), Peek v. Kemp, 784 F.2d 1479, 1494 n. 15 (11th Cir. 1986); King v. Strickland, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, 105 S.Ct 2020 (1985). An attorney has a duty to undertake reason-

able investigation or "to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct at 2066, 80 L. Ed.2d at 695. Elledge made his counsel aware of his unhappy and abused past; yet counsel did not even interrogate Elledge's family members to ascertain the veracity of the account or their willingness to testify. He also did not seek out potentially helpful expert witnesses.

Briefly stated, counsel's total failure to investigate possible witnesses, both expert and lay, when he was aware of Elledge's past and knew that mitigation was his client's sole defense, was unprofessional performance.

B. Prejudice

1. Whether a favorable psychiatrist could have been found with reasonable diligence.

The district court stated that "counsel for the respondent conceded that a psychiatrist such as Dr. Dorothy Lewis, who testified in Mr. Elledge's defense during the evidentiary hearing before this Court, could have been located in 1977 to testify during the sentencing proceeding . . . ."[13] This led

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[13] Dr. Dorothy Lewis testified in Elledge's defense at the federal habeas hearing. She found that he suffered from organic brain dysfunction, episodic rages and paranoid behavior. She also stated that in her opinion Elledge became especially violent when he felt he was teased, tricked or in danger. Her conclusion was that the combination of organic brain dysfunction, psychotic paranoia and childhood abuse caused a disorder that affected Elledge during the Strack homicide.

the court to conclude that counsel's performance fell below the standard set out in Tyler v. Kemp, 755 F.2d 741, 744-45 (11th Cir. 1985).[14] The court went on to conclude, however, that even had counsel produced such a witness the death sentence nevertheless would have been imposed. Consequently, Elledge was not prejudiced; counsel was not ineffective under Strickland; and the sixth amendment was not violated.

Although the district court's conclusion that the sixth amendment had not been violated is correct, the analytic framework the court used to determine that a favorable witness could have been located was inaccurate. The record re-

[14] The court also found that the failure to present the witnesses was not a decision of trial strategy. See Thomas v. Wainwright, 767 F.2d 738, 744 (11th Cir. 1985), cert. denied, 106 S.Ct 1241 (1986).

veals that the State's counsel merely acknowledged that Dr. Lewis was extant in 1977 and had formulated her clinical theories at that time. The State never conceded that a reasonably diligent investigation would have uncovered either Dr. Lewis or a similar expert who would have testified favorably at Elledge's sentencing.

Specifically, the district court concluded that, in 1977, counsel "could have located" Dr. Lewis. The test, however, is not simply whether counsel "could have located" a witness similar to the one eventually produced. Instead, the court must determine whether it is reasonably likely that a reasonable attorney, operating under the circumstances of the case and acting in a reasonably professional manner, would have

located such a witness.

In other words, Strickland requires only that counsel conduct a reasonable investigation. Strickland, 466 U.S. at 691, 104 S.Ct at 1066. To prove that he was prejudiced by counsel's failure to investigate and to produce a certain type of expert witness, a habeas peti-

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15 In making this determination, the court must look to what constitutes a reasonable effort; i.e., what a competent attorney would have done given the constraints of time and money under the facts of the case. Merely producing Dr. Lewis, several years later, is of no moment. We note that Dr. Lewis was practicing psychiatry in New Haven, Connecticut in 1977; it strikes us as extremely doubtful that Elledge's counsel would have discovered Dr. Lewis in 1977 with a reasonably diligent investigation. We also note that Dr. Lewis neither testified that she would have come to Florida to testify in 1977 nor that she knew of anyone in Florida who shared her views at that time. We make no comment on whether a similar expert was reasonably discoverable -- we merely hold that the record before us reveals no evidence demonstrating such a likelihood.

tioner must demonstrate a reasonable likelihood that an ordinarily competent attorney conducting a reasonable investigation would have found an expert similar to the one eventually produced. If such a result was not reasonably probable, the petitioner was not prejudiced by counsel's failure to investigate. Merely proving that someone -- years later -- located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort.[16]

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[16] Simply put, the Strickland test requires a habeas petitioner in Elledge's position to show: (a) that it was professionally unreasonable for counsel not

In deciding whether a petitioner has met his burden a court must look to all the circumstances of the case and consider all the evidence presented.[17]

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to investigate; (b) what kind of, and how much, investigation an ordinary, reasonable lawyer would have undertaken; (c) that it is reasonably probable that a reasonable investigation would have turned up an expert who would have presented testimony similar to that which was eventually adduced; and (d) that it is reasonably probable that this testimony would have affected the sentence eventually imposed. Failure to meet any of these steps defeats the ineffectiveness claim.

[17] We stress that a reviewing court need not address each aspect of the Strickland analysis before concluding that counsel was not ineffective. Strickland, 466 U.S. at 697, 104 S.Ct at 2069-70. Once the court determines that a habeas petitioner cannot meet any one of the various steps, the court need go no further. Id. For example, a district court may simply elect not to address whether an expert was reasonably available and instead conclude that counsel was not ineffective because no prejudice inhered in that such testimony would not have affected the ultimate sentence imposed.

In this case, however, the district court addressed the "availability" is-

asault on prison guard, while jailed, necessitating transfer to other prison, formed basis for shackling). These factual circumstances are clearly capable of repetition at other future State sentencing proceedings, and on Federal collateral review, requiring the immediate binding and uniform resolution of this issue, by this Court.

The Eleventh Circuit's majority decision, extending this Court's precedent to a clearly inapplicable and distinguishable set of facts, has effectively undermined the underlying principles of this Court, governing the use of physical restraints on a defendant. This Court's prior decisions, clearly did not directly address the propriety of shackling, as the sole restraint, at a defendant's capital sentencing. Holbrook; Estelle; Allen. The

Elledge cannot demonstrate that he was prejudiced by counsel's failure to investigate his mental condition and produce a favorable expert witness.

2. Effect of the psychiatric and family testimony on the ultimate sentence.

Even if Elledge's counsel had produced Dr. Lewis and Elledge's family members at the sentencing phase, we

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widely the proposed theory was accepted at the time the investigation occurred and the ease an attorney would have had in getting such experts, and (c) any other relevant testimony that would tend to demonstrate it was reasonably probable that reasonable diligence would uncover an expert similar to the one eventually located.

We emphasize that the duty is only to conduct a reasonable investigation. Counsel is not required to "shop" for a psychiatrist who will testify in a particular way. See Barfield v. Harris, 540 F.Supp. 451, 457-59 (E.D. N.C. 1982), affirmed, 719 F.2d 58 (4th Cir. 1983), cert. denied, 104 S.Ct 2401 (1984).

agree with the district court that Elledge was not prejudiced thereby: he nevertheless would have received the death penalty.

The value of Dr. Lewis' testimony was undercut in part by the revelation that her analysis largely relied on Elledge's recitations and had not been fully corroborated by independent follow-up investigation. In addition, the two court-appointed psychiatrists who examined Elledge each gave damaging evaluations that would have diluted Dr. Lewis' impact.[19] Moreover, much of the testimony elicited from Elledge's brother and sister could be used against

[19] Of all the several experts who examined Elledge over the years, only Dr. Lewis found him to be operating under extreme emotional or emotional disturbance caused by organic brain damage. The great weight of expert testimony clearly cut against Dr. Lewis' testimony and made it less persuasive.

him; e.g., their descriptions of his early violent temper, his sister's explanation of his alleged incestuous assault on her, his brother's description of Elledge as "a mean guy," and their emergence as normal citizens even though they had been subjected to similar abuse and neglect. The family testimony also was cumulative to a degree since Elledge had testified to many of the particulars in question.

As a final point, the aggravating circumstances of the case were substantial. It cannot be gainsaid that the cruelty of the rape and the murder made it more difficult for Elledge to alter the final sentence by adducing mitigating circumstances. It is proper for a reviewing court, in deciding whether the additional evidence would have altered

the eventual sentence, to consider the strength of the case presented against the defendant.[20] See Strickland, 466 U.S. at 696, 104 S.Ct at 2069, 80 L.Ed. 2d at 699 ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.")

Elledge nevertheless maintains that if the psychiatric mitigating circumstances had been presented and if those circumstances had been credited by the

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[20] We note and reject Elledge's chaim that the district court misapplied Strickland when it stated that in light of the extreme aggravating circumstances of the Strack murder, "only the most convincing evidence in support of mitigating circumstances could create a reasonable probability . . . that the balance of mitigating circumstances did not warrant death." This argument places far too much emphasis on one sentence in a long order; the order, taken as a whole, makes clear that the court applied the proper standard.

judge and jury, the "entire evidentiary picture" would have been altered. See id. at 696, 104 S.Ct at 2069, 80 L.Ed.2d at 699. Psychiatric mitigating evidence has this potential because it may impact the casual relationship that can exist between mental illness and homicidal behavior. Thus, psychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors. See Huckaby v. State, 343 So.2d 29, 33-34 (Fla. 1977), cert. denied, 98 S.Ct 393 (1977).

This argument fails, however, because a careful reading of the district court's order shows that the court -- acting within its discretion as fact-finder -- gave little weight to the testimony of Dr. Lewis as well as that of Elledge's family members. The district

court simply found that no significant mitigating evidence was adduced. Further, when the court weighed the value of Dr. Lewis' testimony, it found that the aggravating factors outweighed those presented in mitigation. See, e.g., Mann v. State, 453 So.2d 784, 785 (Fla. 1984), cert. denied, 105 S.Ct 940 (1985); Adams v. State, 412 So.2d 850, 854, 857 (Fla. 1982) (three mitigating factors, including that the capital offense was committed while defendant was under the influence of extreme mental or emotional disturbance, outweighed by three aggravating circumstances), cert. denied, 106 S.Ct 1506 (1986). There is no indication that the district court applied anything other than the "reasonable probability" standard or failed to weigh the overall impact of the evidence

on the total evidentiary picture.

The foregoing discussion illustrates that Elledge has not demonstrated a reasonable probability that, if adduced at trial, the psychiatric and background evidence presented in his habeas proceeding would have caused the sentencer to conclude "that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695, 104 S.Ct at 2069, 80 L.Ed.2d at 698.

III. Consideration of Nonstatutory Mitigating Circumstances

Elledge asserts that he was denied the individualized sentencing determination demanded by the eighth amendment because the sentencing judge restricted his consideration solely to statutory

mitigating factors. See generally Lockett v. Ohio, 438 U.S. 586, 98 S.Ct 2954, 57 L.Ed.2d 973 (1978).

The confusion in Florida law concerning the consideration of nonstatutory mitigating circumstances -- confusion that lasted from 1972 to 1978 -- has been discussed at length by this court. Hitchcock v. Wainwright, 770 F. 2d 1514, 1516 (11th Cir. 1985)(en banc), rev'd sub nom. Hitchcock v. Dugger, 107 S.Ct 1821 (1987). The period of confusion, which was exacerbated by the decision in Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct 2200, 53 L.Ed.2d 239 (1977), finally was put to rest in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct 2185, 60 L.Ed.2d 1060 (1979), after the United

States Supreme Court decided in Lockett that the eighth and fourteenth amendments require the sentencer to consider all mitigating evidence. Hitchcock, 770 F.2d at 1516.

Elledge, who was sentenced after Cooper and before Songer, concedes that the trial court allowed him to introduce nonstatutory mitigating evidence; he also acknowledges that his attorney did not feel precluded from presenting such evidence. Elledge maintains, however, that the trial judge did not consider the nonstatutory evidence that was adduced and that the jury was improperly instructed to consider only the statutorily enumerated factors.

Recently, in Hitchcock v. Dugger, 107 S.Ct 1821, 95 L.Ed.2d 347 (1987), the Supreme Court overturned a Florida-

imposed death penalty, basing its decision on a somewhat similar Lockett claim. The sentencing proceedings in Hitchcock -- including the judge's instruction to the jury, the arguments to the jury, and the trial court's admission of evidence of nonstatutory mitigation -- resemble Elledge's proceedings.

We nevertheless find Hitchcock inapplicable to these facts. Hitchcock did not create a per se rule of reversal when the trial judge gives a particular jury instruction.[21] Instead, the Court focused on the specific facts of the sentencing proceeding and emphasized that both the judge and the jury be-

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[21] The judge's instruction in Hitchcock involved a statement to the jury that "the mitigating circumstances which you may consider shall be the following," followed by a listing of the statutory factors. Hitchcock, 107 S.Ct at 1824. The state trial judge in Elledge's case used a virtually identical instruction.

lieved themselves to be limited to statutory mitigating factors. See id., at 1823. Although parts of the jury instructions in Elledge's case were virtually identical to those in Hitchcock, the trial judge in Hitchcock, when sentencing the defendant, indicated he considered solely the statutory factors: "there were insufficient mitigating circumstances as enumerated in Fla. Statute 921.141(b) to outweigh the aggravating circumstances." Id., at 1824 (emphasis in the original). In the case before us, there is no such statement indicating an improperly narrow focus by Elledge's trial judge.

Moreover, we have in this record an affirmative statement by the state trial judge that indicates he did not feel he was limited to the statutory mitigating

factors. Specifically, in discussing whether a particular piece of evidence, which was of a nonstatutory mitigating nature, should be allowed into evidence, the judge said, "I don't think I am limited on mitigation to a specific statute." Tr. of Sentencing Proceedings, Vol. 8 at 246.

The differing factual setting presented here persuades us that Hitchcock is not dispositive of this case. Even assuming that the instruction to the jury was erroneous under Hitchcock, the sentencing jury in Florida's trifurcated capital scheme is merely advisory. The trial judge, alone, makes the ultimate decision as to sentencing in capital cases. See Proffitt v. Florida, 428 U.S. 242, 252, 96 S.Ct 2960, 2966, 45 L. Ed.2d 913 (1976). When the trial judge

has the proper view of the law -- as is evident from the record here -- and imposes sentence based not only on statutory, but also on nonstatutory, factors, the resulting sentence meets the constitutional parameters outlined in Lockett.

Elledge argues, however, that his trial judge's improper view of the law is demonstrated by an earlier case in which the judge who sentenced Elledge was adjudicated by the Florida Supreme Court to have held "the mistaken belief that he could not consider nonstatutory mitigating circumstances." Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). Elledge also cites the record of a second earlier case, State v. Rose, which allegedly indicates that the same trial judge held an improper view. The death penalty in Rose eventually was over-

turned on other grounds. 425 So.2d 521 (Fla. 1983), cert. denied, 105 S.Ct 2689 (1985).

While this raises a concern about the trial judge's perceptions, we are unpersuaded. The two trials Elledge points to preceded Elledge's case; had they bracketed his trial they would be more conclusive. Additionally, the Florida Supreme Court, which reversed the trial judge for his mistaken views in Jacobs, was presented on appeal with the argument that the judge held that same, improper view in Elledge's trial. Although obviously aware of the possible problem -- to the point of having overturned a death sentence on those grounds in Jacobs -- the state supreme court found that the judge held no such erroneous perception in Elledge's case. We

agree.

In sum, the record reflects no manifestations that the trial judge held an improper view toward nonstatutory mitigating evidence.

IV. The Enmund v. Florida claim

Elledge maintains that his death sentence violated his eighth amendment rights as articulated in Enmund v. Florida, 458 U.S. 782, 102 S.Ct 3368, 73 L.Ed.2d 1140 (1982). The key to his argument is an attempt to distinguish "causation" from "culpability."

Active participation in the murder vitiates the Enmund concerns. Hitchcock v. Wainwright, 745 F.2d 1332, 1340 (11th Cir. 1984), affirmed, 770 F.2d 1514 (11th Cir. 1985) (en banc), cert.

granted, 54 U.S.L.W. 3809 (June 9, 1986); Drake v. Francis, 727 F.2d 990, 997 (11th Cir. 1984), affirmed in part, reversed in part, remanded in part (all on other grounds) sub nom. Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc). There was no Enmund-type violation in this case.[22]

V. Disparate Application of the Death Penalty

Elledge argues that the death penalty is applied in an unconstitutionally discriminatory manner in Florida. He points to empirical studies which indi-

[22] We also note that the trial judge implicitly may have found Elledge intended to murder Strack when the judge found that the murder was committed to avoid arrest for rape. Such a factual finding, of course, would carry a presumption of correctness. Cabana v. Bullock, 106 S.Ct 689, 697-98, 88 L.Ed. 2d 704, 717-18 (1986).

cate that, when the victim is white, the death sentence is imposed in Florida at an aberrationally higher rate.

The Supreme Court recently rejected this same claim as based on a study of Georgia's application of the death penalty. See McCleskey v. Kemp, 107 S.Ct 1756 (1987). The Court concluded that a petitioner who raises such an allegation "must prove that the decisionmakers in his case acted with discriminatory purpose." Id. at 1766 (emphasis in original). Elledge's claim cannot pass this scrutiny.

VI. Shackling

Just prior to selecting the jury that would sentence Elledge, the state trial judge announced that a law en-

forcement official had informed the judge of two matters relating to Elledge. First, while incarcerated, Elledge had stated that, "because he had nothing to lose," he intended to assault the courtroom bailiff. Second, the law enforcement official also had informed the judge that, while in jail, Elledge had become proficient at karate. Accordingly, the trial judge -- acting on his own accord -- ordered Elledge placed in leg irons for the duration of the sentencing phase.

Defense counsel objected to the shackling order; the trial judge overruled the objection. Elledge then asked if he could "say something" and the trial judge refused. Elledge was shackled and remained so for the duration of his sentencing trial.

There is a troublesome question as to whether the appearance in shackles of a defendant whom the jury has just convicted of a gruesome crime is so inherently prejudicial that he is thereby denied his constitutional right to a fair capital sentencing proceeding.

Initially, the prejudice perceived when a defendant is seen in shackles by the jury involves the presumption of innocence. The issue has usually arisen in the context of a determination of guilt or innocence. Courts focus upon the prejudicial impact restraints have on the defendant's presumption of innocence. See, e.g., Allen v. Montgomery, 728 F.2d 1409, 1413 (11th Cir. 1984); Collins v. State, 297 S.E.2d 503, 505 (Ga. App. 1982); State v. Tolley, 226 S.E.2d 353, 367 (N.C. 1976). Were this

the sole rationale which prohibits courtroom shackling, the defendant here would have no case. The jury knows he is not innocent. Having just convicted him of a crime that makes him a candidate for capital punishment, he is no longer entitled to a presumption of innocence.

Arguments could be made that the jury's view of such a convicted murderer would have no effect on the sentencing or, indeed, may benefit the defendant. A jury may be more inclined to give a life sentence if it feels a defendant can be securely confined, as evidenced by the shackles. Seeing that the defendant can be properly restrained, it is not necessary to give the death sentence in order to protect against future harm. On the other hand, a jury might view the

shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision.

With no definitive answer as to how the shackling at sentencing would affect the jury, it might be appropriate to consider the issue on a case-by-case basis and make a judicial evaluation as to the effect on the jury in each particular case. Much as we might be inclined to follow this path, it would not seem to be available if controlling precedents are faithfully followed. The problem is that the Supreme Court has not bottomed the prohibition against shackling on presumption of innocence alone. When a broader concern is

brought into play, there seems to be no reason to restrict the principles to the guilt-innocence phase of the trial. The language of the Supreme Court and this Court in opinions regarding shackling, gives full consideration to that broader concern.

The Supreme Court has characterized shackling as an "inherently prejudicial practice." Holbrook v. Flynn, 89 L.Ed. 2d 523, 534 (1986).[23] "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dig-

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[23] Nothing in Holbrook indicates that the Supreme Court did not intend its ruling to apply to the penalty phase of a capital case; furthermore, it is unreasonable to believe that the court made its rule in Holbrook unaware that capital case trials are bifurcated. We think Holbrook means what it says.

nity and decorum of judicial proceedings that the judge is seeking to uphold." Illinois v. Allen, 397 U.S. 337, 344 (1970). When shackling occurs, it must be subjected to "close judicial scrutiny," Estelle v. Williams, 425 U.S. 501, 503-04 (1976), to determine if there was an "essential state interest" furthered, Holbrook, 89 L.Ed.2d at 534, by compelling a defendant to wear shackles and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed. Holbrook, 89 L.Ed.2d 525; Woodard v. Perrin, 692 F.2d 220, 221 (1st Cir. 1982); Hardin v. Estelle, 365 F.Supp. 39, 47, aff'd on other grounds, 484 F.2d 944 (5th Cir. 1973).

This Court has fully adopted the broad concerns reflected in the Supreme

Court opinions. Allen, 728 F.2d at 1413-14; Zygadlo v. Wainwright, 720 F. 2d 1221, 1223-24 (11th Cir. 1983), cert. denied, 466 U.S. 941 (1984).

Putting the case in the same posture as it would be had the shackling occurred at the guilt-innocence stage of the trial, it is apparent that resentencing is required. Before selecting the jury to sentence Elledge, the trial court suddenly announced that it had decided to shackle Elledge:

> I received information from Chief Miro yesterday, the Chief of Detention for the Broward Sheriff's Office.
>
> He told me he received information from two of the Lieutenants -- one in the jail, and one in the Detective Division -- that Mr. Elledge had become a karate expert, while in prison -- apparently; and he was going to attack my Bailiff, either on the way to the courtroom or in the courtroom, today, because he had

> nothing to lose -- he is now serving two life sentences, plus fifty years for rape; and he is facing a death penalty, or another life sentence, arising out of this situation; that he has been adjudged guilty of these particular crimes.
>
> In an abundance of precaution, I entered an Order to leave Mr. Elledge in leg irons here in these proceedings.
>
> MR. McCAIN: For the record, the defense would object to it, in the presence of the jury, having the belief it would unduly influence and prejudice the jury against the defendant.
>
> THE COURT: Fine. I think we ought to put it on the record.
>
> THE DEFENDANT: May I say something, your Honor.
>
> THE COURT: No sir. We will be in recess.

First, Elledge was denied the required procedure when the court refused him an adequate opportunity to challenge the untested information that served as the basis for the shackling. Under the

decided case law, the court should have given the defense a reasonable opportunity to meet the surprise information or at the very least should have allowed Elledge the opportunity to speak with his attorney, who then could have possibly made a more specific argument. Zygadlo v. Wainwright, 720 F.2d at 1223-24 (noting that due process may require an evidentiary hearing if the factual basis for security procedures was in dispute); State v. Moen, 491 P.2d 858, 860-61 (Idaho 1971) (defendant should be afforded a reasonable opportunity to meet the information); Tolley, 226 S.E. 2d at 368 (evidentiary hearing is required). Moreover, in Bowers v. Maryland, 507 A.2d 1072, 1078-81 (Md. 1986), cert. denied, 93 L.Ed.2d 265 (1986), the only case that squarely ad-

dresses shackling at the capital sentencing stage, the State's highest court found no error with the shackling after the defendant was given an opportunity to contest the necessity of shackling.

The record does not show whether Elledge was going to admit these allegations, contest them as false, or provide rebuttal evidence to indicate that he was behaving well as a prisoner, the last option recently recognized as mitigating evidence which must be considered by the sentencer. Skipper v. South Carolina, 90 L.Ed.2d 1 (1986). Only with an adversary process can the reliable evidence be sorted out from the unreliable. Future dangerousness can be determined only "when the convicted felon has the opportunity to present his own side of the case." Barefoot v.

Estelle, 463 U.S. 880, 901 (1983).

The second problem with the shackling decision is that the State at no time made any showing that the shackling was necessary to further an essential state interest. Needless to say, the security and safety of a state's courtrooms is an essential state interest. Holbrook, 89 L.Ed.2d at 534. There is no indication that the trial court considered alternative restraints, as the court is required to do. Id. at 530-32; Woodard, 692 F.2d at 221; Hardin, 365 F.2d at 47. Safeguards deemed necessary by other courts dealing with the issue are absent in Elledge's case. The trial court never "polled the jurors to determine whether any of them would be prejudiced by the fact that the defendant was under restraints." Woodard, 692 F.

2d at 222. See also, Bowers, 507 A.2d at 1081 (voir dire adequate to screen out one juror who indicated shackling would influence him). The trial court also gave no specific cautionary instruction. See, e.g. Billups v. Garrison, 718 F.2d 665, 668 (4th Cir. 1983); Commonwealth v. Brown, 305 N.E. 2d 830, 834 (Mass. 1973).

Since these matters could not now be satisfactorily determined by an evidentiary hearing in federal district court after the passage of ten years since sentencing, it is quite appropriate that a writ of habeas corpus issue as to the capital sentence, with the state to have the right to conduct a constitutional sentencing procedure.

Conclusion

The district court's judgment is vacated and the case is remanded to the district court with directions to issue the writ of habeas corpus setting aside the sentence of death in the absence of a new sentencing trial.

EDMONDSON, Circuit Judge, concurring in part and dissenting in part:

Although I am unwilling to concur in the court's judgment, I concur in its opinion except that part of the opinion concerning shackling of persons already found to be guilty of serious violent crimes.

The court holds that Elledge is entitled to a new sentencing hearing because the majority feels that shackling Elledge without first holding a hearing violated Elledge's constitutional right to a fair trial. I believe that the per se rule the court adopts today represents an extension of the law unrequired by the Constitution or binding precedent. I therefore respectfully dissent.

Before examining the law in this area, it is important to remember the

situation in which this shackling occurred. Elledge had confessed to and pled guilty to the violent, brutal murder of Margaret Strack. Moreover, by the time he faced sentencing for the Strack murder, Elledge also had been convicted of a second murder that he committed during an armed robbery some two days after he killed Strack. See Elledge v. Florida, 346 So.2d 998, 999-1000, 1001 (Fla. 1977). In other words, Elledge was not a person who, in a fit of passion, had committed one aberrant killing in an otherwise exemplary life. The state trial judge declared, on the record, that he had received information from law enforcement officials that, while in prison, Elledge had vowed that because "he had nothing to lose" he intended to assault the courtroom bailiff

while at sentencing. Moreover, the judge stated that he had been informed that, while in prison, Elledge had become proficient at karate. After stating this information on the record, the judge ordered the prisoner's legs shackled. Although an objection was made to the shackling, the defense did not request a hearing,[1] nor did the defense

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[1] Although the court apparently places great weight on Elledge's question -- i.e., "May I say something" -- it is unwilling to categorize this question as a request for a hearing. I agree that this question cannot be viewed as a hearing request. Elledge was neither pro se nor co-counsel pro se. In such a setting the trial judge is justified in listening solely to the defense's representative -- in this case, the lawyer. In fact, the trial judge may be required to listen solely to the defense's representative. See generally State v. Tait, 387 So.2d 338, 339-40 (Fla. 1980); Thompson v. State, 194 So.2d 649, 650-51 (Fla. Dist. Ct. App. 1967). Needless to say, there may have been several tactical reasons why defense counsel did not actually want his client to be heard regarding this supposed attack on the bailiff. For example, defendant's story

contest the factual accuracy of the judge's statements,[2] request curative instructions or suggest alternative, less restrictive means of restraint.

The court says that in such a situation the state trial judge violates the Constitution unless he holds a hearing before restraining the already-convicted defendant. In other words, the court today creates what seems to be a per se rule that requires a state trial judge always to hold a hearing before shackling a defendant at the sentencing phase

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may have buttressed rather than undercut the view that defendant was dangerous or counsel may have feared that defendant would perjure himself. See generally Nix v. Wainwright, 106 S.Ct 988, 994 (1986) (counsel's duty of advocacy and loyalty is limited to lawful conduct; counsel cannot take steps that aid presentation of false evidence).

[2] The defense has never denied the factual accuracy of the assault claim in any subsequent stage of Elledge's proceedings.

of a bifurcated trial -- even when no hearing is requested. I cannot agree that the Constitution requires this.

Three major points refute the court's position. First, this case is not controlled by precedent because no federal court has addressed the constitutional impact of shackling at sentencing. All of the cases decided by federal courts involve courtroom security restraints of an accused at the guilt-innocence stage of trial. The primary constitutional concern at the guilt-innocence phase -- fear that the restraint will interfere with the defendant's presumption of innocence -- is not present here; the absence of this pivotal concern renders the guilt-innocence phase inapposite to sentencing phase shackling. Second, even when an

accused's presumption of innocence is directly impacted -- i.e., when the accused is restrained at the guilt-innocence stage -- federal appellate courts have not reversed a trial judge's exercise of discretion in imposing restraint. Third, we are reviewing a state court proceeding; therefore, we examine this case solely for constitutional error and not under our powers of supervision. That is, our personal views of how the state trial judge ought to have acted are irrelevant, as is whether we would require, in our supervisory capacity, a federal trial court to have acted differently.

The court says that we are bound by precedent to reach the result it reaches.[3] I must stress, however, that

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[3] For example, the majority states that a reversal is required if "controlling

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Neither the United States Supreme Court, nor any federal circuit court of appeals has addressed the constitutional impact -- if any -- of physical restraints imposed on a convicted murderer at the sentencing stage of a bifurcated state trial. Instead, the case law concerns shackling at the guilt-innocence stage of trial. The distinction between the two settings is crucial because the single major analytic thrust of all the guilt-innocence phase cases is to determine whether the defendant's right to a presumption of innocence[4] was infringed by the security measure adopted by the

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[4] While not specifically set forth in the Constitution, the precept that a defendant is presumed innocent by the American justice system until proven innocent has been deemed a critical part of the right to a fair trial. See Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct 1691, 1692, 48 L.Ed.2d 126 (1976).

trial court.[5]

Elledge is unentitled to a presumption of innocence; once that overriding concern is eliminated from the evaluation, our analysis must be different. The guilt-innocence stage cases are materially different in three respects. When the defendant's right to a presumption of innocence is not present, the defendant's constitutional interest in

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[5] I agree that courts addressing the issue of courtroom restraints on occasion have mentioned other factors -- e.g., restraints are somewhat of an affront decorum, shackling may confuse the defendant -- than possible impact on the presumption of innocence. None of those cases imply in any way, however, that the other factors would be sufficient, if standing alone, to violate the Constitution. Nor do they imply that the analysis would be identical if the presumption of innocence was not at risk. In fact, even in those cases in which other factors are mentioned, the critical issue emphasized by all of those courts is whether the security measure might interfere with the defendant's right to a presumption of innocence.

remaining unshackled is severely reduced. Moreover, the court is notified that courtroom security is at issue. Finally, in such a setting a juror's view toward the shackles is substantially altered because the shackles are expected. Cases involving the guilt-innocence phase shackling of defense witnesses provide an apt illustration of these significant differences.

On occasion, courts have ordered a defendant's witnesses shackled when those witnesses are inmates in maximum security prisons. Shackling an inmate witness is analogous to shackling a defendant at the sentencing phase and reflects the three differences mentioned above.

First, the decision to shackle an inmate witness is similar because such a

witness, as a convicted felon, has no right to a presumption of innocence. See Harrell v. Israel, 672 F.2d 632, 637 (7th Cir. 1982) ("Presumably, a person confined in a maximum security institution has committed at least one serious breach of the law. With respect to that offense, he is not presumed innocent.")

Second, courts facing this issue in the inmate-as-witness setting have recognized that one's status as a convicted felon raises the presumption that the inmate is dangerous; phrased differently, it places the trial court on notice that courtroom security is at risk. "Should such a [convicted felon] ... harbor any thoughts of escape, revenge or violence, the courtroom would provide the most obvious opportunity to act on them. Less intrusive measures may have

an even more detrimental impact on the jury than shackles." Id. See United States v. Fountain, 768 F.2d 790, 794 (7th Cir.) (decision to shackle witnesses was prudent given fact that most witnesses were murderers), amended in part on other grounds, 777 F.2d 345 (7th Cir. 1985), cert. denied sub nom. Silverstein v. United States, 106 S.Ct 1647 (1986), cert. denied sub nom. Gometz v. United States, 106 S.Ct 1647 (1986). The same is true whenever any person convicted of a violent felony appears before the court.

Shackling an inmate witness is similar to sentencing phase shackling for a third reason: the jurors view the shackles differently and are likely less prejudiced by the shackles. "The prejudice caused by shackling was mitigated

by the jury's awareness that the entire dramatis personae in the two cases were prison inmates -- most of them murderers -- and guards. The shackles could not have come as a surprise." Id. (emphasis added). See generally Wilson v. McCarthy, 770 F.2d 1482, 1485 (9th Cir. 1985) (shackling of witness was justified by security concerns consisting of witness's prisoner status, seriousness of witness's prior conviction and that case involved prison gang). This analysis recognizes the common sense proposition that most citizens would not be surprised at -- and probably would endorse -- the practice of physically restraining felons convicted of violent crimes when those felons are removed from the controlled environment of their penal institutions. The Supreme Court

acknowledged this practical, "common human experience" reality in Holbrook when it noted that four uniformed troopers in the courtroom "are unlikely to have been taken [by the jury] as a sign of anything other than a normal official concern for the safety and order of the proceedings. Indeed, any juror who for some other reason believed defendants particularly dangerous might well have wondered why [more extensive security precautions were not in effect.]" Holbrook, 106 S.Ct at 1347, 89 L.Ed.2d at 536 (emphasis added). The jurors in Elledge's case certainly had "some other reason" -- i.e., other than the shackles -- to believe Elledge was dangerous; many might have wondered why the state did not impose additional restraints.

Holbrook indicates that in deciding whether a particular security measure is inherently prejudicial courts must rely on "reason, principle, and common human experience." Id. at 1346, 89 L.Ed.2d at 535 (quoting Estelle v. Williams, 425 U.S. 501, 504, 96 S.Ct 1691, 1693, 48 L. Ed.2d 126 (1976)). Fountain, Harrell and Wilson all illustrate by analogy that shackling at the sentencing phase raises different concerns than guilt-innocence phase shackling and is not inherently prejudicial. The court admits as much when it notes that there is "no definitive answer as to how the shackling at sentencing would affect the jury." Supra, at ____.[6] Thus, reason,

[6] In fact, shackling may help a murderer avoid the death penalty; some empirical evidence exists that supports such a view. In a poll released on January 12, 1987 by the Associated Press, 86

principle and common human experience

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percent of the people polled stated that they supported the death penalty. Significantly, the number one justification cited for the death penalty -- given by 42 percent of its supporters -- was "to protect society from future crime that person might commit." That is, many people who support the death penalty view it as a means, albeit an extreme one, to ensure that the criminal will not commit the same kind of crime in the future. Shackles are an outward sign that the criminal is securely controlled and demonstrates that the state can and will prevent the prisoner from being able to commit violent crimes again.

This information is not meant to prove that shackles in fact aided Elledge. Instead, I believe this kind of data demonstrates that we do not know how a sentencing juror reacts when he sees that a felon convicted of a violent murder is shackled. I therefore agree with the court's statement that "there is no definite answer" as to whether shackles are prejudicial. This seems to me to lead to the inexorable conclusion that it cannot be inherently prejudicial to shackle a defendant at the sentencing phase of his trial. Because this court has no more reason to believe that such shackling is prejudicial than to believe that it is not, this court should not hold that sentencing phase shackling is inherently prejudicial. Certainly, I am unwilling to presume prejudice.

demonstrate that sentencing phase shackling cannot be inherently prejudicial.

Significantly, even when the presumption of innocence is directly at risk -- i.e., when an accused is shackled at the guilt-innocence stage of trial -- the federal courts of appeal and United States Supreme Court have refused to interject their view of what trial courts ought to do. Decisions concerning courtroom security are accorded broad discretion. Simply put, the amount of security required in a particular courtroom, for a particular felon, in a particular community on a particular day is a highly intuitive decision that must be based on experience, common sense and sensitivity to all the circumstances of the moment. Obviously, the trial judge is the best person to

make such decisions; reviewing courts consequently reverse only for abuse of discretion. See Wilson v. McCarthy, 770 F.2d 1482, 1484 (9th Cir. 1985); Harrell v. Israel, 672 F.2d 632, 636 (7th Cir. 1982); Payne v. Smith, 667 F. 2d 541, 544 (6th Cir. 1981); Passman v. Blackburn, 652 F.2d 559, 568 (5th Cir. Aug. 6, 1981), cert. denied, 102 S.Ct 1722 (1982).

A survey of the case law concerning the use of shackles and other security measures at the guilt-innocence phase demonstrates my point. The court has not cited, nor have I found, a single case in which either a United States Circuit Court of Appeals or the United States Supreme Court has overturned a trial judge's decision to employ court-room security measures even at the

guilt-innocence phase. That is, even when the security procedure strikes at the bedrock precept that an accused is presumed innocent until proven guilty, courts have been loath to interfere with the trial court's use of discretion in the area of security-related decisions. It is counterintuitive to reach a different result when the fundamental concern is not present.

Moreover, not only should we generally defer to a trial court's discretion in courtroom-security decisions, our scope of review is severely restricted. Our task "is not to determine whether it might have been feasible for the State to have employed less [intrusive] security measures in the courtroom." Holbrook, 106 S.Ct at 1347-48, 89 L.Ed. 2d at 536. Although if we were exercis-

ing our supervisory capacity "we might express a preference" that less intrusive measures be adopted, "we are much more constrained when reviewing a constitutional challenge to a state court proceeding." Id. at 1348, 89 L.Ed.2d at 536-37. It is important for us to remember that "all a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." Id. at 1348, 89 L.Ed.2d at 537.

Therefore, it is irrelevant, for constitutional review purposes, whether the state trial judge considered less intrusive alternative restraints or did not issue, sua sponte, curative instructions. See Wilson v. McCarthy, 770 F.2d

1482, 1485 & n. 3 (9th Cir. 1985) (while it "may have been the better course" for court to issue curative instruction, court of appeals "decline[d] to impose upon the trial court the mandatory responsibility of given such an instruction."); Woodard v. Perrin, 692 F.2d 220, 221 (1st Cir. 1982) ("a judge should consider less restrictive measures before deciding to shackle a defendant") (emphasis added). It may have been the better course to consider less restrictive alternatives, issue sua sponte curative instructions or conduct a sua sponte hearing. What we may view as the better course, however, is not always required by the Constitution. See Holbrook, 106 S.Ct at 1347-48, 89 L. Ed.2d at 536-37.

In summary, I believe that today's

court has overstepped the proper boundary between federal and state courts and has extended case law that is fundamentally inapposite to the situation this case presents. When the pivotal issue of presumption of innocence is lacking, the defendant's constitutional rights are significantly less. Treating unconvicted persons the same as convicted persons grossly trivializes the rights of persons not convicted of crimes. Shackling can look harsh; and I personally would not impose it lightly. Nevertheless, under the facts as presented here, shackling Elledge did not deprive him of his constitutional right to a fair trial.[7]

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[7] Because we need only decide whether the steps taken in this case violated Elledge's constitutional rights, it suffices here to conclude that in this particular setting -- i.e., when (1) a state trial judge, (2) shackles the de-

We are unjustified in placing yet another aspect of state trial practice under the heavy-handed superintendence of the federal courts. The court today vests convicted felons with a new federal constitutional right; that is, the

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fendant for specific, articulable reasons, in addition to the defendant's status as a felon convicted of a violent murder, (3) enters those reasons in the record, (4) the defense does not request a hearing, (5) the defense does not request curative instructions, and (6) the defense does not suggest less intrusive restraints -- shackling the defendant at the sentencing phase of a state murder trial at which the death penalty is sought does not offend the Constitution. I emphasize that I do not intimate that any of these elements is necessary or that the absence of one or more of them would affect my view. I also do not preclude the possibility that, as a matter of constitutional law, the trial judge could, without holding a hearing, have the defendant physically restrained at the sentencing phase of a bifurcated state trial solely on the basis of the defendant's status as a violent felon. Although I agree that it is normally a good practice to hold a hearing before restraining defendants or witnesses, I do not think that the Constitution requires a hearing in all circumstances.

right to appear in court unfettered unless a hearing is held first and the evidence at the hearing shows us that shackling was truly essential.[8] The restriction on the powers of state courts has not been shown to be imperative to assure the fundamental fairness of sentencing proceedings. I do not believe appellant is entitled to a new sentencing hearing because he was shackled; therefore, I would affirm the district court's denial of the petition for a writ of habeas corpus.

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[8] Federal courts are "forever adding new stories to the temple of constitutional law, and the temples have a way of collapsing when one story too many is added." Douglas v. Jeannette, 319 U.S. 157, 181, 63 S.Ct 877, 889, 87 L.Ed. 1324 (1943) (Jackson, J., concurring in part and dissenting in part) (quoted in Miranda v. Arizona, 384 U.S. 436, 526, 86 S.Ct 1602, 1654-55, 16 L.Ed.2d 694 (1966) (Harlan, J., dissenting)). I would not add to the temple in these circumstances.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-5120

WILLIAM DUANE ELLEDGE,

Petitioner-Appellant,

versus

RICHARD L. DUGGER,

Respondent-Appellee.

Appeal from the
United States District Court for the
Southern District of Florida

ON PETITIONS FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(November 10, 1987)

Before RONEY, Chief Judge, HATCHETT and EDMONDSON, Circuit Judges.

PER CURIAM:

Part III of our original opinion (823 F.2d 1439) is, hereby, withdrawn.

Except for this modification, the petitions for rehearing are denied. The Court having been polled at the request of one of its members and a majority of the judges in active service not having voted in favor of it, the petition for rehearing in banc is denied.

FAY, Circuit Judge, dissenting, in which Judges TJOFLAT, HILL and EDMONDSON, join:

Most respectfully, I dissent from the failure of the court to take this case for in banc consideration. I agree with the dissent of Judge Edmondson as to that section of the panel opinion dealing with shackling. Where guilt or innocence is in question there can be no doubt about the possible prejudice when

a defendant appears in court in shackles. But to place this defendant in the same posture as one going to trial to determine guilt or innocence is simply wrong. Elledge had plead guilty. He was no longer entitled to the presumption of innocence.

Equally troubling to me are some of the other reasons stated by the majority for granting relief. The state trial court is faulted for not holding a hearing, and thus not affording the defense a reasonable opportunity to refute the information received by the trial judge. However, no hearing was requested! The state trial court is also faulted for not affording the defendant an opportunity to speak with his attorney. Immediately after the trial judge announced what he had

learned and what he was going to do, however, he announced a recess. What better time for the defendant and his counsel to confer could have been provided? The state trial court is further faulted for not affording the defendant an opportunity to explain or deny what the judge had heard. Again, the answer is that the defendant's counsel did not request to respond.

The state court is faulted for not considering alternatives to shackling. We have no way of knowing what was or was not considered by the state trial judge. If we are going to guess, assume or presume, however, I would assume that he considered many alternatives. Common sense tells me that no judge would order a defendant shackled without very serious and deliberate consideration. The

state trial court is also faulted for failing to conduct a poll of the jury as to possible prejudice. Once again, no poll was requested!

Even when reviewing a criminal trial held in a federal court, we generally try to correct prejudicial mistakes made in the trial court. Rulings are most often based upon affirmative requests of the litigants or objections to questions or actions being taken. In this instance we are reviewing, by way of a collateral attack, a case tried and reviewed in the state courts. It is my opinion that we have failed to accord the state proceedings that deference required under the law. See, e.g., Holbrook v. Flynn, 106 S.Ct 1340, 1348 (1986); Wainwright v. Witt, 105 S.Ct 844, 854 (1985); Patton v. Yount, 467

U.S. 1025, 1036-38 (1984). In addition, we are granting relief based upon the failure to do things which defendant's counsel never requested while speculating that explanations were available that have never been subsequently alleged. For these reasons, I dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-6176-CIV-EBD

WILLIAM DUANE ELLEDGE,

Plaintiff,

versus

LOUIE L. WAINWRIGHT,

Defendant.

FINAL ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

THIS MATTER is before the Court on the petition for the writ of habeas corpus filed by WILLIAM DUANE ELLEDGE, a State prisoner sentenced to death for the 1974 murder of Ms. Margaret Strack. An evidentiary hearing was held on July 2 and 3, 1985 on the issue of ineffective assistance of counsel at the sentencing stage. At the hearing, the

Court heard testimony from several witnesses for the Petitioner. Counsel for the Petitioner and counsel for the Respondent introduced new evidentiary material, which this Court has reviewed. After careful consideration of the evidence introduced at the hearing, as well as the entire record in this case, it is:

ORDERED AND ADJUDGED that the Petition for the Writ of Habeas Corpus is hereby DENIED, for the reasons expressed in this Order.

I. PROCEDURAL BACKGROUND

Petitioner's death sentence has been reviewed extensively by the state and federal courts prior to this habeas corpus petition. Mr. Elledge's conviction for the first degree murder of Margaret Strack was upheld by the Florida Supreme Court in Elledge v. State,

346 So.2d 998 (Fla. 1977). However, the Florida Supreme Court set aside Elledge's death sentence and remanded the case to the trial court for a new sentencing proceeding, which is the matter challenged in this habeas corpus petition. A new sentencing trial was conducted on August 2, 1977 before the original trial judge, the Honorable M. Daniel Futch, Jr. Once again, Petitioner was sentenced to death by electrocution. The Florida Supreme Court affirmed the second death sentence in Elledge v. State, 408 So.2d 1021 (Fla. 1981). The United States Supreme Court denied certiorari in Elledge v. Florida, 459 U.S. 981 (1982) and denied rehearing in Elledge v. Florida, 459 U.S. 1137 (1983).

During the pendency of his direct

appeal to the Supreme Court of Florida, Petitioner joined 122 other death row inmates in a state habeas corpus proceeding challenging the Florida Supreme Court's practice of reviewing non-record information concerning the personal backgrounds and mental health status of capital appellants. The Florida Supreme Court denied relief, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); the United States Supreme Court denied certiorari, Brown v. Wainwright, 454 U.S. 1000 (1981).

Following the exhaustion of Mr. Elledge's direct appeals, and the rejection of an executive clemency request made to the Governor of Florida, Petitioner filed with the state trial court a motion to vacate judgment and sentence, pursuant to Fla.R.Crim.P. 3.850.

Petitioner also filed two original petitions in the Florida Supreme Court collaterally attacking his death sentence. The Florida Supreme Court rejected all the collateral attacks. Elledge v. Graham, 432 So.2d 35 (Fla. 1983). Certiorari was denied by the United States Supreme Court in Elledge v. Florida, ___U.S.___, 104 S.Ct 436, 78 L.Ed.2d 368 (1983).

The procedural history has been recited here to emphasize the narrow scope of review by this Court. The habeas corpus statute requires this Court to presume the validity of factual findings made by the state courts, unless one of the exceptions, not present here, exists. See 28 U.S.C. §2254(d)(1)-(8). See also Sumner v. Mata, 449 U.S. 539 (1981)(provisions of 28 U.S.C.

§2254 require federal courts to presume the correctness of state appellate court findings of fact, as well as presume the correctness of state trial court findings.)

The delay in these proceedings, regarding a death sentence for a murder which occurred in 1974, was occasioned in part by a change in the law. Petitioner's guilt is unquestioned; he confessed to the brutal rape and murder of Margaret Strack. At the time of the Strack homicide, it was not clear whether the death penalty was constitutionally permissible. In Furman v. Georgia, 408 U.S. 238 (1972)(per curiam) (nine separate opinions, 5 concurring and 4 dissenting, one written by each of the Justices), the Supreme Court found that the particular death sentences on

first degree murder). See also, Roberts v. Louisiana, 431 U.S. 633 (1977)(declaring unconstitutional a statute which imposed a mandatory death penalty for the murder of a policeman).

The Florida death penalty statute, similar to the Model Penal Code, was upheld by the Supreme Court in Profitt v. Florida, 428 U.S. 242 (1976). The statute contains specific aggravating factors (in Fla. Stat. §921.141(5)) to be balanced against specific mitigating factors (in Fla. Stat. §921.141(6)). Thereby, the statute guides sentencing discretion by "requiring specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428

U.S. 242, 258 (1976).

Elledge's death sentence, which was one of the first death sentences reviewed by the Florida Supreme Court after the Proffitt decision, was overturned because an aggravating factor under Fla. Stat. §921.141(5)(c) -- Mr. Elledge's murder of Mr. Nelson in Jacksonville approximately two nights after the Strack homicide -- was improperly considered by the trial court when it imposed the death penalty during the first sentencing proceeding. See, Elledge v. State, 346 So.2d 998, 1003-1004 (Fla. 1977). In this Court's review of the sentencing trial upon remand, which led to Petitioner's second sentence of death for the murder of Margaret Strack, the state trial court properly followed the constitutionally-

required procedures for death cases. We will now briefly review the 12 grounds for relief in the Amended Petition for Writ of Habeas Corpus before turning to the subject of the evidentiary hearing, the claim of ineffective assistance of counsel at the sentencing stage.

II. TWELVE GROUNDS FOR WRIT OF HABEAS CORPUS OTHER THAN INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING TRIAL REJECTED

Petitioner cited twelve grounds for the writ of habeas corpus. See Amended Petition for Writ of Habeas Corpus at 12(A) - 12(L). All twelve grounds are without merit. As this Court has previously informed present counsel for Petitioner, the only claim which this Court considers worthy of serious attention is the claim -- not enumerated as one of the 12 points in the Amended Petition for Writ of Habeas Corpus -- of

ineffective assistance of counsel at the sentencing trial. The twelve grounds in the Amended Petition are flawed for two reasons: (1) Petitioner pled guilty to first-degree murder, and (2) the legal grounds have been raised, considered, and rejected on the merits previously by other courts. Therefore, this Court will not re-open matters previously decided, and decided correctly in the view of this Court.

Petitioner, ELLEDGE, represented by counsel, knowingly and voluntarily entered a plea of guilty to murder in the first degree for the murder of Ms. Margaret Strack. The major ground running throughout the twelve grounds in the Amended Petition is that Mr. Elledge did not intend, in the legal sense, to kill Margaret Strack because of mental

disorder. See especially Ground No. 1 (¶12B) (lack of criminal intent defense could have been raised); Ground No. 3 (¶12C) (death, disproportionate sentence on these facts); Ground No. 4 (¶12D) (VI ineffective assistance at guilt trial because available defense of intent not raised); Ground No. 6 (¶12F) (lack of intent); Ground No. 8 (death sentence on these facts shocks the conscience).

Regardless of what Petitioner may claim at this time, Petitioner's plea of guilty means that he has admitted that he had intended to kill Ms. Strack. Premeditation is an essential element to first-degree murder. See, Fla. Stat. §782.041(a) (first-degree murder). The statute defines first-degree murder as a capital felony. Id. Petitioner knew

that the penalty for a capital felony was 25 years, minimum, imprisonment without parole, unless the sentencing trial conducted under Fla. Stat. §921.141 resulted "in findings by the court that such person shall be punished by death, and in the later event such person shall be punished by death." Fla. Stat. §775.082(a) (Penalty for capital felony conviction).

Petitioner has made no claim that his counsel failed to inform him of the consequences of his plea of guilty to first-degree murder -- the consequences including the possibility of a death sentence and that there would be no further trial of any kind on the question of Petitioner's guilt to premeditated first-degree murder. Petitioner is presumed to have been informed of the

charges by counsel. Henderson v. Morgan, 426 U.S. 637 (1976). The federal court cannot make a determination of the credibility of Petitioner's claims that he did not understand the consequences of the guilty plea -- admission of the plea is tantamount to a finding of lack of credibility. Marshall v. Lonberger, 459 U.S. 422 (1983). Further, the Petitioner's plea of guilty was not rendered involuntary because of the possibility of death or motivation or expectation of a lesser penalty than if a jury trial on guilt were held, and the jury found Petitioner guilty of capital murder. Brady v. United States, 397 U.S. 742 (1970). Guilty pleas are necessary to our system of justice and constitutional. See, e.g., Blackledge v. Allison, 421 U.S. 63

(1977); Santoldlo v. New York, 404 U.S. 257 (1971); Brady v. United States, 397 U.S. 742 (1970). Therefore, the fact of Petitioner's intent to kill Margaret Strack has been established.

To the extent that the Amended Petition raises issues of violation of state law, federal habeas corpus relief is not available to correct an error of state law unless so egregious to deny due process or equal protection. Pulley v. Harris, 465 U.S.___, 104 S.Ct 871, 79 L.Ed.2d 29 (1984). See, Amended Petition ¶12E (denial of continuance) and ¶12G (leg irons).

To the extent the Petition raises grounds which were not raised below, the Petition fails because no show of cause and prejudice for a federal habeas corpus court to review the claims has

been made under the standard of Wainwright v. Sykes, 433 U.S. 72 (1977). See Amended Petition, ¶12B (guilty plea not knowingly waived) and ¶12D (ineffective assistance of counsel at trial).

The most basic reason the Petition fails is that the claims have been reviewed before; therefore, under judicial rules of preclusion for issues of law actually and necessarily litigated previously and the federal habeas statute's presumption of correctness of factual findings of state courts, the Petition must be denied. However, in an abundance of caution, the Court will list the twelve grounds in the Petition and discuss their merits.

The grounds are, as stated in the Petition: (1) Petitioner's right not to be compelled to incriminate himself

was violated by prolonged, repetitive, continuous police interrogation in the face of his assertion of his right to remain silent, and the statements finally given by petitioner as a result of such interrogation should have been suppressed; (2) Because Petitioner's testimony during the guilty plea proceeding raised a defense, which petitioner did not specifically and understandingly waive, his guilty plea was entered unknowingly and unintelligently, requiring that he be given the opportunity to withdraw his plea; (3) On the basis of what is now known but not considered at trial concerning the mental and emotional condition of Bill Elledge, his life history, and the consequences of the offense in question, death is a disproportionate sentence, forbidden by the VIII

and XIV Amendments, and the imposition of death without consideration of these critical facts denied Bill Elledge the individualized sentencing determination mandated by the VIII and XIV Amendments; (4) Petitioner was deprived of effective assistance of counsel at trial in violation of his rights guaranteed by the VI and XIV Amendments; (5) The trial court's denial of petitioner's request for a continuance deprived petitioner his right to a fair trial; (6) Petitioner did not intentionally take the life of Margaret Strack, and accordingly, cannot be put to death for her homicide; (7) The circumstances under which the trial court at the sentencing trial ordered petitioner to be restrained in leg irons throughout the course of his trial denied petitioner

due process and the right to a reliable sentencing procedure; (8) Petitioner's death sentence shocks the conscience because the proceedings used to impose it were grossly unreliable and wholly arbitrary, and, thus, failed to meet the safeguards required by the VIII and XIV Amendments for the constitutional imposition of the death penalty; (9) The Florida Supreme Court's cursory, incomplete review of the aggravating and mitigating circumstances in petitioner's case violated the court's unique responsibilities in the review of capital prosecutions; (10) The Supreme Court of Florida's practice, unauthorized and unannounced by statute or rule, of requesting and receiving ex parte information concerning appellants in pending capital appeals, without notice to these

appellants or their attorneys, denied or appeared to deny death-sentenced appellants, including Mr. Elledge, due process of law, the effective assistance of counsel, and the right of confrontation and subjected them to cruel and unusual punishment and to compulsory self-incrimination, in violation of the XIV Amendment and its incorporated guarantees; (11) The death penalty is imposed in Florida in an arbitrary, capricious and irrational manner, based upon factors precluded from consideration by the Florida death penalty statute and the United States Constitution; and (12) As applied, the Florida death penalty statute violates the VIII and XIV Amendments because it fails to channel jury discretion and permit the interjection of irrelevant factors into the sen-

tencing process by the jury and trial judge.

The Court has reviewed Petitioner's confession and finds that the police complied with the requirements of Miranda v. Arizona, 384 U.S. 436 (1966). The facts, as found below, establish that Petitioner knowingly and intelligently chose to speak with police officers. Further, Petitioner's plea of guilty to the offense of the first-degree murder was a knowing and intelligent choice, based upon the alternatives before him, as found by the trial court and reviewed previously by the state and federal court system. See, Procedural History, supra, Part II. Therefore, grounds one and two are rejected by this Court. (Amended Petition ¶12A and ¶12B).

The Court declines the opportunity

to declare the entire Florida death penalty system arbitrary and capricious, Ground No. 11 (¶12K), as suggested by counsel for Petitioner. The statistical evidence provided by Petitioner, largely based upon the findings of Stanford University Professor Samuel R. Mauro (Stanford School of Law) and Robert Mauro (Stanford Department of Psychology) is insufficient. See, McCleskey v. Kemp, 753 F.2d 877, 892 (11th Cir. 1985)(en banc) (holding that statistical proof of disparate racial impact alone is insufficient to invalidate a capital sentencing scheme). The race issue with regard to capital punishment seems particularly off-point in this case, where both the killer and the victim were white. The Florida Supreme Court's practice of review of ex parte evidence,

Ground No. 10 (¶12J), has been considered and rejected in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert.denied, 454 U.S. 1000 (1981). This Court cannot say the Florida Supreme Court conducts a "cursory review" of death sentences, Ground No. 9 (¶12I), indeed, Petitioner Elledge's first sentence of death was overturned when the Florida Supreme Court reviewed the death sentence in Elledge v. State, 346 So.2d 998 (Fla. 1977). Nor can this Court state that, as applied, the Florida death penalty statute is unconstitutional. The Court finds no "irrelevant factors" considered by the trial court in this case, and until Proffitt v. Florida, 428 U.S. 242 (1976) (holding Florida death penalty statute valid) is overruled or modified, this Court adheres to the view that the

statute is both facially valid, and valid as applied to Petitioner Elledge, Ground 12 (¶12L).

Lockett v. Ohio, 438 U.S. 586 (1978) requires that there can be no limitation on what a defendant can offer in mitigation of sentence. As discussed in Part IV of this Order, we believe that whether or not Mr. Elledge's sentencing trial counsel understood his penalty phase proceedings as limited by the specific mitigating factors contained in the Florida Statute, counsel's performance at the sentencing trial was constitutionally deficient. (The Lockett issue in Ground No. 5 (¶12E). Similarly, the denial of a continuance and counsel's failure to prepare and adequately investigate Petitioner's background support this Court's finding

in Part IV that counsel's performance was deficient, Ground No. 5 (¶12E). For the reasons which will be developed in Part IV, the Court finds that there would have been no different result if a continuance had been granted, a proper investigation conducted by counsel, and the witnesses proffered at the sentencing trial who testified at the evidentiary hearing. To the extent that the proffered testimony might involve the Lockett issue, it is our opinion that "the proffered evidence of non-statutory mitigating evidence would not have affected the sentencing outcome in this case had it been submitted to the jury." Francois v. Wainwright, 763 F.2d 1188, 1190 (11th Cir. 1985) (case similar to Elledge in that Petitioner was multiple killer, mitigating evidence of sordid

and impoverished childhood environment would not have changed sentencing outcome). The appearance of Petitioner before the sentencing jury in leg irons was not an abuse of discretion on the part of the trial judge, who feared for the safety of the participants at the trial. See, Elledge v. State, 408 So.2d 1021, 1022-1023 (Fla. 1981) (holding no abuse of discretion).

III. BACKGROUND TO INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING TRIAL CLAIM

The evidentiary hearing was called by this Court in order to make a determination of Petitioner's VI Amendment claim of ineffective assistance of counsel at the sentencing stage of the proceedings against him for the murder of Ms. Margaret Strack. The Court considers the ineffectiveness claim the on-

ly claim by Petitioner with arguable merit. As in all VI Amendment ineffectiveness claims, this case is controlled by the Supreme Court's decision last year in Strickland v. Washington, ___ U.S.___, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). Strickland not only controls this case, it is also factually quite similar to this case. There, as here, the VI Amendment ineffectiveness challenge was to a death sentence under the Florida death penalty statute, §921.141, Florida Statutes. Strickland involved a psychiatric defense as a mitigating factor under the same Florida statute; this case also turns upon a psychiatric defense which could have been presented at a Florida death sentence proceeding. Strickland decided that the Florida death sentencing proceeding, at issue in

this case, was sufficiently like a trial that for the purposes of describing counsel's duties under the VI Amendment, Florida's capital sentencing proceeding was like a trial. Strickland v. Washington, ___U.S.___, ___, 104 S.Ct 2052, 2064, 80 L.Ed.2d 674, 693 (1984). Strickland controls this case because it describes counsel's duties under the VI Amendment. Strickland established a two-part test for VI Amendment ineffective assistance of counsel claims: (1) Performance - counsel must provide reasonably effective assistance; and (2) Prejudice - there must be a reasonable probability of a different result with effective assistance of counsel. Strickland v. Washington, ___ U.S.___, ___, 104 S.Ct 2052, 2064, 80 L.Ed.2d 674, 693 (1984). A defendant must make

both showings in order to prevail on his VI Amendment ineffective assistance of counsel claims. Id.

Petitioner Elledge, in the view of this Court, has met the first requirement under the Strickland test; his counsel at the sentencing proceeding did not provide reasonably effective assistance of counsel. The evidentiary hearing was called by the Court on the narrow issue of whether the Petitioner met the prejudice prong of the two-part Strickland test. As the Supreme Court has recently reiterated, the VIII Amendment Cruel and Unusual Punishment clause compels a heightened need for reliability in the determination that death is the appropriate punishment in a specific case. Caldwell v. Mississippi, ___ U.S. ___, ___, 53 U.S.L.W. 4743, 4744 (June

11, 1985).

To prevail on the prejudice prong, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, ___U.S.___, ___, 104 S.Ct 2052, 2068, 80 L.Ed.2d 674, 699 (1984).

A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury below. As the Court explicitly defined the question which we must answer today:

> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of

aggravating and mitigating circumstances did not warrant death.

Strickland v. Washington, ___U.S.___, ___, 104 S.Ct 2052, 2069, 80 L.Ed.2d 674, 698 (1984).

Based upon the totality of the evidence - including a thorough review of all the previous state trial and appellate proceedings, as well as the testimony and evidence introduced at the evidentiary hearing before this Court - the Court concludes that there is not a reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant Petitioner's death sentence. Therefore, the Petition must be denied.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REJECTED BECAUSE PREJUDICE PRONG FOR INEFFECTIVE ASSISTANCE OF COUNSEL NOT MET

As counsel for Petitioner correctly notes, Mr. Elledge's only plausible defense was that he did not intend in a fully deliberate and knowing way to kill Ms. Strack because Mr. Elledge suffered from severe mental and emotional disorder. If this defense could be proven, Mr. Elledge might succeed in establishing a mitigating circumstance under either Subsection 6(b) or Subsection 6(f) of Fla. Stat. §921.141. Subsection 6(b) defines as a mitigating circumstance: "The capital felony was committed under the influence of extreme mental or emotional disturbance." Subsection 6(f), the more plausible of the two under these facts, reads: "The capacity of the defendant to appreciate the crim-

inality of his conduct or to conform his conduct to the requirement of law was substantially impaired."

The facts of the Strack murder and rape on Saturday, August 24, 1974 -- as well as the murder of Edward Gaffney six hours later, early Sunday morning, August 25, 1974, and the murder of Mr. Kenneth Nelson, early Monday morning, August 26, 1974 -- are fully set out in the Florida Supreme Court's 1977 opinion in Elledge v. State, 346 So.2d 998 (Fla. 1977). The Court will not recite the details, except to agree with present counsel for Petitioner that the blind, cold, and deliberate appearance of Petitioner's behavior on the day of the homicide required some psychiatric defense if Elledge were not to receive the death penalty for the brutal murder of Ms.

Margaret Strack.

Yet, counsel presented a psychiatric defense without a psychiatrist, as present counsel for Petitioner accurately characterizes the performance of then-counsel for Petitioner at the August 1977 sentencing trial. Counsel presented no psychiatric testimony in mitigation at the sentencing trial and no background character testimony from family members in mitigation, but both kinds of witnesses were available for the August 1977 sentencing trial. At oral argument before this Court, counsel for the respondent conceded that a psychiatrist such as Dr. Dorothy Lewis, who testified in Mr. Ellerbe's defense during the evidentiary hearing before this Court, could have been located in 1977 to testify during the sentencing proceed-

ing before Judge Futch. Counsel presented only one defense witness, Mr. Elledge himself, who testified in a free-form manner regarding his unhappy childhood and alcohol and drug abuse. Mr. Elledge's family members, in addition to a psychiatrist, could have testified at the sentencing trial, thereby documenting William Elledge's brutal life experience as a battered and unloved child. Yet, no family members were even contacted by counsel.

Counsel's performance fell below the level found violative of the VI Amendment by the Eleventh Circuit in Tyler v. Kemp, 755 F.2d 741, 744-745 (11th Cir. 1985). In Tyler v. Kemp, counsel for the capital defendant at least interviewed family members before the sentencing trial. See also, King

v. Strickland, 748 F.2d 1462, 1463-1464 (11th Cir. 1984) (failure to present available character witnesses in mitigation during penalty stage of death case can violate VI Amendment). Unlike Thomas v. Wainwright, ___F.2d___ (11th Cir. 1985), Elledge's counsel's decision not to present background evidence was not defensible as a matter of trial strategy. In Thomas, counsel decided not to present evidence of the defendant's unsavory background in order to advance arguments consistent at the sentencing trial with those advanced at the guilt phase, that the evidence against the defendant was circumstantial and, therefore, the jury should hesitate to sentence a man to the electric chair where the defendant's guilt was in doubt. See, Thomas v. Wainwright, ___F.2d___,

___, (11th Cir. 1985). In Elledge's case, Petitioner's guilt was unquestioned. Sentencing was the sole matter at issue in August 1977 following the Florida Supreme Court's affirmance of Elledge's conviction and reversal of Petitioner's sentence. Sentencing trial counsel had no reason for his failure to present testimony from a psychiatrist or family members in mitigation of his sentence. An attorney has a duty to make a reasonable investigation; "the reasonableness of a decision on the scope of investigation will often depend upon what information the defendant communicates to the attorney." Mitchell v. Kemp, 762 F.2d 886, 888-889 (11th Cir. 1985)(finding counsel's decision not to investigate or present mitigating background evidence reasonable). In this

case, there is no indication that Elledge did not fully inform his counsel regarding his background and family, which could have provided mitigating evidence if investigated and presented as testimony at the sentencing trial in 1977. Of course, the question remains whether the testimony presented at the evidentiary hearing before this Court -- which we find could have been presented in August 1977 if Elledge had received reasonably effective assistance of counsel -- meets the prejudice prong in Strickland v. Washington.

At the evidentiary hearing held before this Court, Ms. Connie Wright, Petitioner's older sister, and Mr. Daniel Elledge, one of Petitioner's younger brothers, testified in defense of their brother William Elledge. They testified

that counsel had not contacted either of them, or any other family member prior to the August 1977 sentencing proceeding. Further, they testified that they would have come from Oklahoma to Florida to testify on their brother's behalf if they had been asked.

Based on the sole testimony in mitigation of sentence given by the Petitioner himself, the trial judge found no mitigating circumstances that would prevent a death sentence for the murder of Margaret Strack. (Trial Record V, at 399)(August 2, 1977). The trial court provided Petitioner with free psychiatric examination by two psychiatrists, constitutionally compelled for indigents in death cases by the recent Supreme Court ruling Ake v. Oklahoma, ___U.S.___, 53 U.S.L.W. 4179 (February 26, 1985).

The psychiatrists each gave damaging evaluations, to the effect that Petitioner did not commit the Margaret Strack murder while under the influence of extreme mental or emotional disturbance, that Mr. Elledge was sane, and Mr. Elledge understood and appreciated the nature and consequences of his acts at the time of the homicide.

The trial court found no mitigating circumstances, but found three aggravating circumstances. The court found that Mr. Elledge's murder of Margaret Strack was: (1) a capital felony during the commission of a rape, Fla. Stat. §921.141(5)(d); (2) a capital felony committed for the purpose of avoiding arrest, Fla. Stat. §921.141 (5)(e); and (3) a capital felony that was especially heinous, atrocious and

cruel, Fla. Stat. §921.141(5)(h). See, Trial Record V at 398-399. The trial court balanced no mitigating circumstances against three aggravating circumstances and concluded that death was the appropriate sentence Mr. Elledge should receive for the first degree murder of Margaret Strack.

The aggravating circumstances in the Strack homicide committed by Mr. Elledge are extreme, and amply supported by the record, including Petitioner's own statements. Further, as factual findings of a state trial court, restated and upheld by the highest state appellate court, they are presumed to be correct. See, 28 U.S.C. §2254(b) and Sumner v. Mata, 449 U.S. 539 (1981). Given the atrocious and cruel nature of this violent murder, only the most con-

vincing evidence in support of mitigating circumstances could create a "reasonable probability ... that the balance of aggravating and mitigating circumstances did not warrant death." Strickland v. Washington, ___U.S.___, ___, 104 S.Ct 2052, 2069, 80 L.Ed.2d 674, 698 (1984). See, William v. Maggio, 737 F.2d 1372, 1394 (5th Cir. 1984) (statements by other defense witnesses who merely told more about the defendant's troubled adolescence and mental condition would not have changed the result that defendant deserved death for murder of rape victim, where evidence presented by state in aggravation included confession by defendant describing how victim was repeatedly stabbed in the throat, and defendant showed little remorse for his crimes).

Petitioner's chief witness at the evidentiary hearing before this Court was Dr. Dorothy Otnow Lewis, an eminent psychiatrist currently a Professor at New York University Medical School and Professor of Clinical Medicine at Yale Medical School. Dr. Lewis received her undergraduate degree from Harvard and her medical degree from Yale. She is the author of numerous scientific works in the field of psychistry, including two chapters in a leading psychiatric text on antisocial behavior; the Chapters are entitled "Conduct Disorder and Juvenile Delinquency" and "Adult Antisocial Behavior and Criminality." Petitioner's Exhibits 10 & 11. At the hearing, Dr. Lewis testified that adults who commit violent acts such as homicide frequently have central nervous system

disorders, a history of severe head injuries, an adverse childhood environment in a violent, abusive family, and genetics of mental disorder, especially a psychotic first-degree relative. She believed William (Bill) Elledge suffered all of these symptoms. However, she did not find in Mr. Elledge another frequent characteristic, very low I.Q., bordering on the retarded, from 70 to 80 on the I.Q. scale. Mr. Elledge seemed to be of above average intelligence. She did not disagree with tests in Mr. Elledge's medical records which indicated his I.Q. at 104 (100 as average I.Q.).

Dr. Lewis interviewed Mr. Elledge three times at the Florida prison in Starke. The interviews lasted approximately three hours each, and were conducted in late 1982 and early 1983, ap-

proximately eight and a half years after the Strack murder. She interviewed Mr. Elledge's mother once by telephone. Based on this investigation, and review of various medical reports conducted earlier and upon Mr. Elledge's confessions, she wrote a report in 1983 which is attached as Exhibit C to the Appendix to the Amended Petition for the Writ of Habeas Corpus, filed in this action. Dr. Lewis interviewed Connie Wright and Daniel Elledge for approximately one hour each on the morning of the first day of the evidentiary hearing, July 2, 1985.

Dr. Lewis concluded that Petitioner suffers from organic brain disfunction, episodic rages, and paranoic behavior. Dr. Lewis believes that Mr. Elledge becomes especially violent when he feels

teased, tricked, or in danger. She emphasized that, in her view, the combination of brain damage, witnessing extraordinary family violence, psychotic paranoia, and child abuse produced the disorder that affected Mr. Elledge during the Strack homicide. She felt that Mr. Elledge's disorders caused a rage at the time of the homicide that was ungovernable and beyond his control.

Dr. Lewis was a very credible witness and the Court has no reason to question the sincerety of her diagnosis. She regards Mr. Elledge's murder and rape of Margaret Strack as the psychotic reaction of a person who is organically brain-damaged. Yet, as counsel for Respondent pointed out in their cross-examination of Dr. Lewis and in closing argument, her diagnosis of organic brain

damage is contrary to the diagnosis of all the other psychiatrists who have examined Mr. Elledge, including the doctors who examined him closest in time to the Strack murder. Counsel for the parties have provided the Court with Petitioner's medical records by all examining psychiatrists, Petitioner's Army records, records from the California Youth Authority, the Colorado State Hospital, as well as the statements and drawings by the Petitioner. The Court has been unable to find conclusive support for Dr. Lewis' diagnosis.

Dr. Lewis could have provided the strongest evidence in favor of mitigation if she had diagnosed Mr. Elledge as insane. However, she stated that she does not believe Mr. Elledge is insane, in that respect, agreeing with the other

doctors who examined Mr. Elledge and found him fully competent to stand trial. Nor could Dr. Lewis state that Mr. Elledge suffered from epilepsy, although she felt that he might have experienced some form of psycho-motor seizure after the Strack homicide. This hypothesis was substantially undermined during cross-examination. The facts in Mr. Elledge's own contemporaneous statements -- as well as his disposal of the body of Margaret Strack shortly after the crime and Mr. Elledge's murder of Edward Gaffney six hours after the Strack homicide -- do not support the theory that Petitioner experienced an epileptic seizure which caused him to murder Margaret Strack.

Although the testimony of Connie Wright corroborated the facts of Mr.

Elledge's terrible childhood of abuse and beatings, it undermined some of the conclusions in Dr. Lewis' report. In her report, Dr. Lewis stated that Bill Elledge was "forced to stimulate his sister Connie sexually" when Bill was nine years old, that the "sexual relationship with his sister continued throughout childhood," and that Bill's "first experience of intercourse was with his sister." Report, Appendix to Amended Habeas Petition, at C-3. Connie Wright flatly denied all allegations of an incestuous relationship with her brother Bill. She testified that Bill attempted to assault her when whe was fourteen years old (and Bill was twelve and a half), but that her father interceded and dragged Bill away. She denied any other sexual contact, or attempted

sexual contact, with her brother. The Court, based on its view of the credibility of Ms. Connie Wright, concludes that her version is probably closer to the truth than the version in Dr. Lewis' Report. While this tale of incest does not cast doubt upon the credibility of Dr. Lewis, it does cast substantial doubt upon the data Mr. Elledge told Dr. Lewis -- the data upon which Dr. Lewis based her Report and diagnosis.

Additionally, Connie Wright and Danny Elledge testified extensively regarding Bill's violent temper as a child. Connie and Danny stated that he was frequently violent towards them. In one particular incident recounted by both of them, Bill is remembered as violent and dangerous. One night the parents, who were leaving the house to go to a bar,

told Connie to keep Bill out of the garage where their father kept his television repair shop. The father feared Bill would destroy the shop and his equipment. Bill was about 15 years old at the time, Connie was about 17 and Danny was approximately 9. As soon as their parents left, Bill attempted to get into the garage. When Connie tried to stop Bill, Bill smashed his father's guitarr over Connie's head. Danny chased Bill away by breaking off a soft drink glass bottle and threatening him. Connie recalled that Bill seemed "murderous," "strong and screaming," in a spell of extreme anger like their mother.

Danny Elledge testified to the violent childhood environment -- the continual beatings and humiliations which

their mother subjected all the children. Danny said that he was an abused child, as were all six of the children. He agreed with Connie that Bill received the worst of the abuse. Danny stated that there was no way to stop their mother when she started -- she used belts, metal hangers, or whatever object she could find to beat her children. Their father was the only person who could physically restrain the mother from attacking the children, which she did without any reason whenever she became angry. Danny testified that his father was a good man, who struggled to keep the family together and provided what little love and affection there was in the household. On cross-examination, Danny testified to various robberies and burglaries committed by Bill when he was

a child. Danny said that Bill is "a mean guy, he can be mean."

Although Connie and Danny's testimony documented Bill's tortured childhood, they also presented a picture of the Petitioner as a violent, aggressive, and dangerous person even when he was a child. Further, their presence as normal, law-abiding citizens, despite the abuse they suffered as children from their mother in a hellish household, might have served to hurt, rather than help the Petitioner's defense of mitigation. Connie and Danny have been able to lead responsible lives -- undermining Petitioner's claim that he should not be held fully responsible for his acts.

At the evidentiary hearing, one witness was called who unquestionably would have hurt Petitioner's defense,

Officer Kenneth Roach. Officer Roach was one of the first officers who questioned Petitioner after his arrest in Jacksonville. Respondent's counsel convincingly demonstrated on cross-examination that calling Roach as a witness would inevitably have led to bringing out the facts of the third homicide -- the Gaffney homicide in Hollywood. The Florida Supreme Court reversed the first death sentence because of the mention and consideration in sentencing of the Gaffney homicide. If Roach had been called at the August 1977 sentencing proceeding, the advisory jury and the sentencing judge would have had three homicides committed in quich succession to consider in sentencing Mr. Elledge for the murder of Margaret Strack. The additional damaging evidence would also

have undermined what little claim of remorse for the Strack homicide which Petitioner could present.

V. CONCLUSION

In conclusion, the Court returns to the analysis in Strickland, in its review of the ineffective assistance of counsel at sentencing claim. As in Strickland, the aggravating circumstances in this case are utterly overwhelming. The proposed psychological evidence, despite the earnest and professional presentation by Dr. Lewis, would have been of little help to Petitioner. The admission of some of the evidence the Petitioner now seeks to enter for consideration might even have been harmful to his case. As the Court concluded in Strickland, this Court must now conclude in regard to Mr. Elledge's

petition: "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed." Strickland v. Washington, ___U.S.___, 104 S.Ct 2052, 2071, 80 L.Ed.2d 674, 701 (1984). Therefore, the Petition for the Writ of Habeas Corpus must be DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 5th day of September, 1985.

(s) Edward B. Davis
EDWARD B. DAVIS
United States District Judge

cc: Richard H. Burr, III, Esq.
Penny H. Brill, Esq.

SUPREME COURT OF FLORIDA

No. 52,272

WILLIAM DUANE ELLEDGE,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

[October 22, 1981]

PER CURIAM.

This appeal is before us from a jury and judge resentencing of appellant to death, entered upon a plea of guilty. The original death sentence was vacated because of improper consideration as an aggravating factor of a collateral felony for which Elledge at the time had not been convicted. Elledge v. State, 346 So.2d 998 (Fla. 1977) [Elledge I].

The facts surrounding appellant's

convictions for first-degree murder and rape of Margaret Strack are detailed in our first review of appellant's death sentence, and do not require rehashing. It is sufficient to note that Elledge confessed to a weekend of crimes which included the rape and murder of Ms. Strack, the robbery and murder of Edward Gaffney, and the robbery and murder of Kenneth Nelson. This Court vacated appellant's ensuing death penalty for the Strack murder. Although details of the Nelson murder, for which appellant had been convicted before sentencing, were admissible to support the aggravating circumstances of having a previous capital or violent felony conviction, details of the Gaffney murder, for which appellant had not been convicted at the time of sentencing, were not allowable.

Elledge I at 1001-03.

On this appeal appellant attacks his second death sentence on sundry grounds, all of which we have considered, but only five of which warrant discussion.

Appellant first complains that the limited testimony as to the Gaffney murder was not allowable under the literal dictates of our previous opinion in this case. Elledge I at 1003. But the entire thrust of our prior decision was the distinction between felony convictions, which were allowable to prove the corresponding aggravating factor, and a charge for such a crime which was not allowable. Our concern was that the requirements of Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), be met. Provence re-

quires that a conviction is essential for consideration of prior crimes under the aggravating factor in section 921.141(5)(b), Florida Statutes (1977).[1] Yet it is clear from the record that prior to the resentencing trial, Elledge had indeed been convicted for the Gaffney murder. In Elledge I we made clear that evidence of convictions for certain felonies is admissible, including testimony of witnesses, "because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." Id. at 1001. We

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[1] Section 921.141(5)(b), Florida Statutes (1977), reads: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

are at a loss to understand how appellant could claim that evidence of the Gaffney murder is forever barred despite an ensuing conviction in light of the reasoning in Elledge I.

Appellant asserts that his appearance before the sentencing jury in leg irons led to prejudice in the jury's mind. Cases which concern such prejudice deal with the adverse effects that such restraints have upon the accused's presumption of innocence. See, Kennedy v. Cardwell, 487 F.2d 101, 104 (6th Cir. 1973), cert. denied, 416 U.S. 959 (1974). But appellant did not stand before the sentencing jury as an innocent man; rather he stood as a confessed murderer of three persons. The critical issue in a restraint case is the degree of prejudice caused by the restraints. Here, we

can find very little prejudice since the Appellant was an avowed dangerous individual. See, United States ex rel. Stahl v. Henderson, 472 F.2d 556, 557 (5th Cir.), cert. denied, 411 U.S. 971 (1973). Second, such restraints are within the sound discretion of the court, and the record indicates the judge had information that the appellant had threatened to attack the bailiff. Elledge through his confessed acts had proven himself a man of his word when violence was threatened, so we would be hard pressed to find the trial court abused its discretion in taking such precautions.

Appellant next asserts that an aggravating circumstance, that the murder was committed to avoid arrest, found by the judge was unsupported by the evi-

dence. This argument is unfounded for a close examination of the record reveals that Elledge's taped confession and a transcript of that confession were admitted into evidence.[2] During this confession Elledge detailed the victim's threats to call the police when he initiated the rape. Such evidence is sufficient to support the conclusion that Elledge killed the rape victim in order to prevent her carrying out her threat.

Appellant attacks the sentencing order[3] because he claims the trial judge

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[2] State's Exhibit No. 5.

[3] The order reads in part:

On August 3rd, 1977 the jury recommended to this Court that WILLIAM DUANE ELLEDGE be sentenced to death.

Pursuant to law, this Court makes the following findings of fact:

(1) The Defendant does have a significant history of prior criminal activity. The Defendant has been convicted of Murder In The First

included under his initial finding,

Degree in Jacksonville, Florida. He has also been convicted of felonious assault in the State of Colorado. This Defendant has been confined in various institutions for a great portion of his life for various other crimes.

(2) The Defendant did not commit this Murder while under the influence of extreme mental or emotional disturbance. The Defendant was examined by two psychiatrists and both stated that at the time of the crime the Defendant understood and could appreciate the nature and consequences of his acts. Neither Doctor found nor reported that the Defendant was acting under the influence of extreme mental or emotional disturbance at the time of the crime. There was no indication of insanity.

(3) The victim was not a willing participant in the Defendant's conduct and did not consent to these crimes.

(4) This murder was committed while the Defendant was raping the victim or shortly after raping the victim. The murder was committed for the purpose of avoiding arrest, as the victim had threatened to notify the police of the rape and after this threat by the victim, the Defendant committed this murder.

(5) This murder was especially

which stated that Elledge had a signifi-

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heinous, atrocious and cruel. The Defendant choked the victim until she was beating on the wall and gasping for air. He then threw her from the bed onto the floor and again choked her for approximately 15-20 mintues. During this period of time the Defendant was raping the victim.

After the rape and murder were completed, the Defendant then dragged the body of the victim to the door of the motel room, threw her down the steps and dragged her to an automobile. The Defendant then drove her to a church parking lot and threw her from the car. The Defendant then abandoned her almost nude body, with the legs tied together by an electric cord, in the church parking lot.

Based upon these findings of fact, and based further upon the advisory sentence rendered to this Court by the twelve member jury, and it being the opinion of this Court that there are sufficient aggravating circumstances existing to justify the sentence of death, and this Court, being of the additional opinion that NO mitigating circumstances exist,

It is therefore the sentence of this Court, having already adjudged you to be guilty of Murder In The First Degree on March 17th, 1975,

cant history of criminal activity, crimes which were either noncapital or nonviolent.[4] Such an argument is clearly obfuscatory as it is apparent that this initial finding concerned the lack of the mitigating circumstances under section 921.141(6)(a), Florida Statutes (1977),[5] because the findings that directly follow the initial finding also concern lack of mitigating circumstances. The trial judge properly differentiated mitigating from aggravating circumstances in negating the statutorily described

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that you,

WILLIAM DUANE ELLEDGE, be sentenced to Death.

[4] Appellant seeks to characterize the initial finding as the aggravating circumstance under section 921.141(5)(b), Florida Statutes (1977), which concerns prior convictions for capital or violent felonies.

[5] "The defendant has no significant history of prior criminal activity."

migitating circumstance.

Finally, appellant claims that the trial judge limited jury consideration of nonstatutory mitigating circumstances by giving the standard jury instruction which states: "The mitigating circumstances which you may consider, if established by the evidence, are these..." We have previously considered this argument in depth and have flatly rejected it. See, Peek v. State, 395 So.2d 492, 496-97 (Fla. 1980), cert. denied, 101 S. Ct 2036 (1981). See also, Demps v. State, 395 So.2d 501, 505 (Fla. 1981).

Having found no merit in any of appellant's arguments, and having conducted a full review of the sentence which found several aggravating and no mitigating circumstances, we are unable to discern any error that may have deprived

appellant of any protections offered by the judicial process. Accordingly, the sentence of death is affirmed.

It is so ordered.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.